No. 15337

United States
Court of Appeals
for the Ninth Circuit

CENTENNIAL INSURANCE COMPANY, a Corporation,

Appellant,

vs.

DAVE SCHNEIDER, Doing Business as Dave Schneider Wholesale Jewelry,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California,
Central Division

No. 15337

United States
Court of Appeals
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CENTENNIAL INSURANCE COMPANY, a Corporation,

Appellant,

vs.

DAVE SCHNEIDER, Doing Business as Dave Schneider Wholesale Jewelry,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California.
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-15-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Suite 307,
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Long Beach 2, California.

In the District Court of the United States, Southern District of California, Central Division

No. 18517-J

DAVE SCHNEIDER, Doing Business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Plaintiff,

vs.

CENTENNIAL INSURANCE COMPANY, a Corporation,

Defendant.

PETITION FOR REMOVAL OF CIVIL ACTION FROM STATE COURT TO DISTRICT COURT OF THE UNITED STATES

To: The Honorable, the District Court of the United States for the Southern District of California, Central Division:

The petition of Centennial Insurance Company, a corporation, defendant herein, respectfully shows:

I.

On July 25, 1955, a Civil Action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles and is now pending in said Court. Dave Schneider, doing business as Dave Schneider Wholesale Jewelry, is named therein as plaintiff, and petitioner, Centennial Insurance Company, a corporation, is named therein as defendant. The number of said action is LBC-

21548. A photostatic copy of the Complaint and a photostatic copy of the Summons served on petitioner are [2*] attached hereto, marked Exhibits I and II, respectively. Said Complaint and Summons were served upon petitioner on August 2, 1955, and are the only process, pleadings and orders served upon petitioner.

II.

At all times mentioned in said Complaint as well as at the time of the commencement of said action, petitioner was and ever since has been and now is a corporation duly organized and existing under and by virtue of the laws of the state of New York and a citizen of New York; petitioner neither is now nor was it at any of said times a citizen of the state of California.

III.

At all times mentioned in said Complaint, as well as at the time of the commencement of said action, plaintiff was and ever since has been and now is a citizen of the state of California; plaintiff is not now nor was he at any of said times a citizen of the state of New York.

IV.

That there are no other parties to said action, and the controversy is wholly between citizens of different states; said action is of a civil nature, being an action to recover on a policy of insurance, and the amount in controversy, exclusive of interest and cost, exceeds the sum of Three Thousand ($3,000)

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Dollars and is the sum of Twenty-six Thousand Two Hundred Seventy-four and 51/100 ($26,274.51) Dollars; said action is an action of which the District Courts of the United States have original jurisdiction.

V.

Petitioner files herewith a bond in the sum of Two Hundred Fifty ($250.00) Dollars with a good and sufficient surety, conditioned that petitioner will pay all costs and disbursements incurred by reason of this removal proceeding should it be [3] determined that the case was not removable or was improperly removed.

Wherefore, petitioner prays that this Court accept said bond as good and sufficient and approve the same, that said action be removed to this Court, and that no further proceedings be had in the Superior Court of the state of California, in and for the County of Los Angeles, and for such other and further relief as is proper in the premises.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, ST. CLAIR
& VIADRO
Attorneys for Defendant.

Duly verified. [4]

EXHIBIT I

In the Superior Court of the State of California
in and for the County of Los Angeles
No. LBC 21548

DAVE SCHNEIDER, Doing Business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Plaintiff,

vs.

CENTENNIAL INSURANCE COMPANY, a Corporation,

Defendant.

COMPLAINT ON INSURANCE POLICY

Comes now the plaintiff and complains of the defendant, and alleges as follows:

I.

That at all times herein mentioned, the plaintiff was and still is a resident of the City of Long Beach, County of Los Angeles, and State of California, and that at all times herein mentioned, plaintiff Dave Schneider was and still is doing business under the name of Dave Schneider Wholesale Jewelry in said City of Long Beach, County of Los Angeles, and State of California.

II.

That at all times herein mentioned, the defendant was and still is a corporation duly organized and existing, and/or duly authorized to do, and doing, business in said City of Long Beach, County

of Los Angeles, and State of California, under and by virtue of the laws of the State of California.

III.

That on or about the 15th day of August, 1954, for a valuable consideration [7] and premium paid by plaintiff to defendant, the defendant made, entered into, executed, issued and delivered to and with plaintiff a policy and contract of insurance bearing number 2WF 4871, wherein and whereby defendant agreed to pay plaintiff for the loss of or damage to jewelry and other property of the plaintiff, a true and correct copy of said policy and contract of insurance is marked Exhibit "A" hereto attached and made a part hereof; and that in order to prepare said Exhibit "A," it was necessary to make photostatic copies in part from the original policy and in part from the duplicate copy of said original, and to make ink and typewritten insertions on the photostatic copy in order that the original policy remain intact as delivered to plaintiff, and so that Exhibit "A" conformed to the original.

IV.

That the plaintiff at all times has done and performed all of the stipulations, conditions and agreements stated in said policy and contract of insurance to be performed on his part at the time and in the manner therein specified.

V.

That on or about the 3rd day of December, 1954, and at all times herein mentioned, the plaintiff was

the owner of diamonds, precious and semi-precious stones, jewelry mounted with diamonds and precious and semi-precious stones, jewels, jewelry, rings, unset mountings, gold and other stock usual to the conduct of plaintiff's said jewelry business, including sample cases and trays, which said property at all times herein mentioned and at the time of its loss as herein specifically set forth, was and is of the actual cash value of $26,274.51.

VI.

That on or about said 3rd day of December, 1954, the plaintiff suffered and sustained the complete and total loss of said property in said County of Los Angeles and State of California, and that no part of said property has ever been returned to, nor recovered by plaintiff, nor has anyone else recovered the same, and said loss to plaintiff, as aforesaid, thereafter continued and still continues and exists, and against which said loss as aforesaid said defendant and said policy and contract of insurance insured and protected plaintiff and for which said loss as aforesaid defendant agreed to pay plaintiff therefor, and that prior to the commencement of this action the defendant [8] neglected, failed and refused, and still neglects, fails and refuses to pay plaintiff for said loss or any part thereof, all to plaintiff's damage in the sum of $26,274.51.

VII.

That on or about the 3rd day of December, 1954, immediately after said loss occurred as aforesaid,

plaintiff gave defendant immediate notice thereof in writing, and that on or about the 21st day of January, 1955, plaintiff rendered and delivered to defendant a proof of loss of said property, therein fully describing said property lost and said loss, and that on or about said 21st day of January, 1955, the plaintiff duly made claim and demand upon defendant for the payment of said loss, all of which was done and performed by the plaintiff in the manner and as provided by the terms and conditions of said policy and contract of insurance, and thereupon and continuously thereafter the defendant neglected, failed and refused and still neglects, fails and refuses to pay plaintiff for the whole or any part of said loss to plaintiff as aforesaid, and at all times herein mentioned defendant has failed, neglected and refused, and still fails, neglects and refuses to perform terms and conditions of said policy and contract of insurance on defendant's part to be kept and performed, all to plaintiff's damage in the sum of $26,274.51.

Wherefore, plaintiff demands judgment against the defendant in the full sum of $26,274.51, together with interest thereon at the rate of 7% per annum from and after the 3rd day of December, 1954, together with his costs herein, and for such and other relief as the court deems just.

SAMUELSON AND BUCK,

By C. RANSOM SAMUELSON,

Attorneys for Plaintiff. [9]

EXHIBIT II

In the Superior Court of the State of California in and for the County of Los Angeles

No. LBC-21548

DAVE SCHNEIDER, Doing Business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Plaintiff,

vs.

CENTENNIAL INSURANCE COMPANY, a Corporation,

Defendant.

SUMMONS

The People of the State of California Send Greetings to:

Centennial Insurance Company, a Corporation, Defendant:

You are directed to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the ..... Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the ..... Complaint,

as arising upon contract, or will apply to the Court for any other relief demanded in the ..... Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 25th day of July, 1955.

[Seal] HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles;

By V. DOCKERY,
Deputy.

[Endorsed]: Filed August 8, 1955. [12]

[Title of District Court and Cause.]

NOTICE OF FILING PETITION AND BOND FOR REMOVAL

To Samuelson and Buck, Attorneys for Plaintiff in the Above-Entitled Cause:

Please take notice that defendant, on August 8, 1955, filed in the United States District Court for the Southern District of California, Central Division, a petition and bond for the removal of the above-entitled cause from the Superior Court of the State of California, in and for the County of Los Angeles, copies of which are hereto attached.

Dated: August 9, 1955.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, ST. CLAIR & VIADRO,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1955. [21]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT

Defendant, Centennial Insurance Company, a corporation, makes the following answer to the Complaint of plaintiff:

I.

Admits the allegations of paragraph I.

II.

Referring to the allegations contained in paragraph II, defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of New York, and that defendant is authorized to do and is doing an insurance business in the State of California. Defendant denies each and every other allegation contained in said paragraph II inconsistent with the allegations and admissions made herein. [23]

III.

Referring to the allegations contained in paragraph III, defendant admits that it issued and delivered to plaintiff a policy and contract of insurance bearing number 2WF4871, a photo copy of which said policy and contract of insurance is attached to the Complaint marked Exhibit "A." Defendant denies each and every allegation of said paragraph III inconsistent with the allegations and admissions made herein.

IV.

Denies the allegations contained in paragraph IV.

V.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V. Defendant further denies that the said personal property was of the actual cash value of $26,274.51 or in any part thereof, or in any other sum.

VI.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VI. Defendant admits that it has not paid plaintiff any sum at all with respect to the matters alleged in the Complaint, and defendant denies that plaintiff sustained loss and/or damage in the sum of $26,274.50 or in any part thereof, or in any other sum, or at all.

VII.

Referring to the allegations of paragraph VII, defendant admits that on December 3, 1954, plaintiff advised defendant of an alleged loss; further, that on December 21, 1955, plaintiff delivered to defendant a Proof of Loss claiming a loss in the amount of $26,274.51. Defendant denies each and every other allegation contained in said paragraph VII inconsistent with the allegations and admissions made herein; further, denies that [24] plaintiff sustained loss and/or damage in the sum of $26,274.51 or in any part thereof, or in any other sum, or at all.

Defendant admits that it has not made any payment to the plaintiff by reason of the matters alleged in the Complaint.

Second Defense

Without waiving the foregoing defense, defendant alleges that the Complaint fails to state a claim on which relief can be granted against defendant.

Third Defense

Without waiving the foregoing defenses, defendant alleges that the policy of insurance referred to in the Complaint provides as follows:

> "5. This policy insures against all risks of loss of or damage to the above-described property arising from any cause whatsoever except:

"* * * (i) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail."

That the alleged loss occurred, if it occurred at all, while the said property was in or upon an automobile and at a time when neither the assured nor a permanent employee of assured nor a person whose sole duty it was to attend the vehicle, was actually in or upon such vehicle. That the alleged loss was excluded from coverage under said policy by reason of the matters set forth in this third defense. [25]

Fourth Defense

Without waiving the foregoing defenses, defendant alleges that the policy of insurance referred to in the Complaint provides as follows:

"5. This policy insures against all risks of loss of or damage to the above-described property arising from any cause whatsoever, except:

"* * * (M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on

taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken; nor for loss of or damage to goods when sent 'C.O.D.' with the privilege of inspection by the consignee before delivery."

That the alleged loss, if any such loss occurred, is an unexplained loss and/or mysterious disappearance. That the said alleged loss was excluded from coverage under said policy by reason of the matters set forth in this fourth defense.

Fifth Defense

Without waiving the foregoing defenses, defendant alleges that the policy of insurance referred to in the Complaint provides as follows:

"8. It is a condition of this insurance that: (A) The Assured will maintain a detailed and itemized inventory of his or their property and separate listing of all travelers' stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company."

Defendant is informed and believes and therefore on information and belief alleges that plaintiff did not maintain a detailed and itemized inventory as provided in the clause quoted in this fifth defense, and that therefore the alleged loss, if any such loss occurred, was excluded from coverage

under said policy, and/or said policy was breached and thereby said loss, if any such loss occurred, is not recoverable. [26]

Sixth Defense

Without waiving the foregoing defenses, defendant alleges that the limit of liability under said policy, in the event the Court should determine that there be liability, is provided under said policy as follows:

"Limitations of Liability

"2. The maximum liability of the Company resulting from any one loss, disaster or casualty is limited to:

"(A) $40,000.00 in respect of property at the Assured's premises as described herein;

"(B) $20,000.00 in respect of property which is (1) in transit by first class registered mail, or railway express (subject to the stipulations of Exclusion (E) of Section 5), or by armored car service; (2) deposited in the safe or vault of a bank or safe deposit company; (3) in the custody of a dealer in property of the kind insured hereunder not employed by or associated with the Assured, but property deposited for safekeeping with such a dealer by the Assured or its authorized representatives while traveling is subject to the limit expressed in Clause E of this Section;

"(C) $2,000.00 in respect of shipments by first class registered air mail or air express (subject to the stipulations of Exclusion (E) of Section 5) sent to any one addressee at any one address during any one day;

"(D) $500.00 in respect of shipments in transit by customer parcel delivery service and the parcel transportation service of railroads, waterborne or air carriers and passenger bus lines (subject to the stipulations of Exclusion (E) of Section 5);

"(E) $15,000.00 in respect of property elsewhere and not included in Clauses (A), (B), (C) and (D) above or otherwise limited herein."

and

"Sample Cases and Trays Away From Premises—

"4. It is understood and agreed that this policy is extended to cover on sample cases and trays contained therein up to an amount not exceeding $2,000.00 while said sample cases and trays are away from the premises of the Assured named in this policy."

Defendant alleges that in the event that the Court should find liability on the part of the defendant under said policy under the circumstances in which the said loss is said to have [27] occurred, the limit of liability of the defendant for the loss of the "diamonds, precious and semi-precious stones,

jewelry mounted with diamonds and precious and semi-precious stones, jewels, jewelry, rings, unset mountings, gold and other stock usual to the conduct of plaintiff's said jewelry business" (as stated in paragraph V of the Complaint) is limited to $15,000.00, and that the limit of liability of defendant for the loss of the "sample cases and trays" (as stated in paragraph V of the Complaint) is limited to $2,000.00.

Wherefore, defendant prays that plaintiff take nothing by reason of his Complaint, and that judgment be entered herein in favor of the defendant for its costs of Court incurred herein and for such other and further relief as the Court may deem meet and proper in the premises.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, ST. CLAIR & VIADRO,

By /s/ GEORGE H. HAUERKEN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 12, 1955. [28]

[Title of District Court and Cause.]

MINUTE OF THE COURT, MARCH 26, 1956

Present: Hon. Thurmond Clarke, District Judge.

Counsel for Plaintiff: Walter Ely and C. Ransom Samuelson.

Counsel for Defendant: Geo. H. Hauerken.

Proceedings:

For non-jury trial. At 1:00 p.m. court convenes herein, and counsel for both sides being present, Court orders trial proceed.

Counsel for defendant asks leave of Court to exclude witnesses from the courtroom pending call. Court denies said motion.—

Dave Schneider, witness for plaintiff, is called, sworn, and testifies.

Plaintiff's Ex. 1 (Centennial Ins. Policy No. 4871 for $40,500), Plaintiff's Ex. 2 (Proof of Loss in the amount of $26,274.51), are admitted in evidence.

Defendant's Ex. A (Statement of Dave Schneider), Defendant's Ex. B (Deposition of Dave Schneider), are admitted in evidence.

At 1:45 p.m. court recesses.

At 2:10 p.m. court reconvenes herein, and all being present as before, trial proceeds.

Dave Schneider, witness for plaintiff, heretofore sworn, resumes the stand and testifies further.

At 2:55 p.m. court recesses.

At 3:15 p.m. court reconvenes herein, and all being present as before, trial proceeds.

Dave Schneider, witness for plaintiff, heretofore sworn, resumes the stand and testifies on cross-examination.

Plaintiff moves to strike from evidence Defendant's Ex. B, Deposition of Dave Schneider. Later, said motion is withdrawn.

Adolph Stelzer, witness for plaintiff, is called, sworn, and testifies.

Defendant's Ex. C is marked for identification and admitted in evidence.

George W. Nigro, witness for defendants, is called, sworn, and testifies.

Defendant's Ex. D is admitted in evidence.

At 4:10 p.m. It Is Ordered that cause is continued to March 27, 1955, 9:45 a.m., for further trial.

JOHN A. CHILDRESS,
Clerk. [56]

[Title of District Court and Cause.]

MINUTES OF THE COURT, MARCH 27, 1956

Present: Hon. Thurmond Clarke, District Judge.

Counsel for Plaintiff Walter Ely.

Counsel for Defendant: George H. Hauerken.

Proceedings:

For further non-jury trial. At 9:45 a.m. court convenes herein, and plaintiff and counsel being present, Court orders trial proceed.

Attorney Ely, for plaintiff, makes closing argument.

At 10:30 a.m. court recesses.

At 10:50 a.m. Attorney Ely resumes closing argument.

At 11:15 a.m. Attorney Hauerken, for defendant, makes closing argument.

At noon court recesses to 2:00 p.m. At 2:00 p.m. court reconvenes herein, and plaintiff and counsel being present, Court orders trial proceed.

Attorney Hauerken, for defendant, resumes closing argument.

At 2:50 p.m. court recesses. At 3:00 p.m. court reconvenes herein, and plaintiff and counsel being present, Court orders trial proceed.

Attorney Ely, for plaintiff, makes closing reply argument.

Attorney Hauerken, for defendant, makes inquiry of the Court if the Court desires in addition to closing argument, submission of written briefs.

Court advises counsel that if it is considered that a transcript is needed, counsel will be so advised. Counsel stipulate to share costs of transcript, if the Court orders that a transcript be written.

At 3:40 p.m. Court takes the matter under submission.

JOHN A. CHILDRESS,
Clerk. [57]

[Title of District Court and Cause.]

MINUTES OF THE COURT, APRIL 4, 1956

Present: Hon. Thurmond Clarke, District Judge.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Proceedings:

Ruling on submitted matter:

It Is Hereby Ordered that Plaintiff be allowed judgment in the sum of $15,914.50, plus interest at the rate of 7% per annum from Dec. 3, 1954, in the cause heretofore heard and submitted on March 27, 1956. Attorney for prevailing party to prepare and submit Findings of Fact and Conclusions of law within twenty days.

Counsel Notified.

JOHN A. CHILDRESS,
Clerk;

By ED J. FISHER,
Deputy Clerk. [58]

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT OF OBJECTIONS TO FINDINGS AND REASONS THEREFOR

Defendant objects to the findings proposed by plaintiff and proposes the following modification:

That finding No. III be stricken and replaced with the following:

> "That it is true, as alleged in paragraph III of plaintiff's complaint, that on the first day of September, 1954, for a valuable consideration paid by plaintiff to defendant, the defendant made, entered into, executed, issued and

delivered to plaintiff a contract of insurance under which defendant agreed to [59] pay plaintiff for losses of or damage to jewelry and other property of the plaintiff which should occur within one year from August 15, 1954, as more particularly described in the policy of insurance issued by defendant to plaintiff a copy of which, marked Exhibit A, is attached to the complaint on file herein and which policy of insurance is hereby incorporated herein by reference as a part of this finding as if it were fully set forth herein."

Defendant's reasons for the suggested changes are as follows: As now worded, proposed finding No. III purports to find that the policy issued by defendant to plaintiff covered plaintiff for "any loss of or damage to jewelry and other property."

Although it is true that the policy is a so-called all risk policy, it is also true that it contained a number of exclusions so that a finding of coverage for "any loss or damage" would not be correct.

We believe that the best way to handle this problem is to have a finding specifying that the coverage was as provided in the policy and incorporating the policy in the finding.

We have also changed the date at the beginning of finding No. III from August 15 to September 1, 1954. The policy was issued on the latter date but was made effective as of August 15, 1954.

Respectfully submitted,

/s/ GEORGE H. HAUERKEN,

HAUERKEN, ST. CLAIR & VIADRO,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 26, 1956. [60]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial in the above-entitled court, before Honorable Thurmond Clarke, Judge Presiding, and having been tried on March 26th and 27th, 1956, before the Court, sitting without a jury, a jury trial having been waived by the respective parties, plaintiff appearing by his attorneys, Betts, Ely & Loomis and Samuelson & Buck, by Walter Ely and C. Ransom Samuelsen, and the defendant appearing by its attorneys, Hauerken, St. Clair & Viadro, by George H. Hauerken, and evidence, both oral and documentary, having been introduced, and the cause submitted for decision, the Court now makes its findings of fact and conclusions of law as follows: [62]

Findings of Fact

I.

That the allegations in paragraph I of plaintiff's complaint are true.

II.

That it is true, as alleged in paragraph II of the plaintiff's complaint and paragraph II of defendant's answer, that the defendant was and is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of New York, and that defendant is authorized to do and is doing insurance business in the State of California.

III.

That it is true, as alleged in paragraph III of plaintiff's complaint, that on the 15th day of August, 1954, for a valuable consideration paid by plaintiff to defendant, the defendant made, entered into, executed, issued and delivered to plaintiff a contract of insurance under which defendant agreed to pay plaintiff for any loss of or damage to jewelry and other property of the plaintiff which should occur within one year from August 15, 1954.

IV.

That it is true, as alleged in paragraph IV of plaintiff's complaint, that plaintiff performed all of the stipulations, conditions and agreements in such contract of insurance which were specified to be performed on his part.

V.

That it is true, as alleged in paragraph V of plaintiff's complaint, that on the 3rd day of December, 1954, the plaintiff was the owner of certain

jewelry and certain sample cases and trays of an aggregate actual cash value of $26,274.51. [63]

VI.

That the actual cash value of that certain jewelry referred to in the preceding paragraph was $25,360.01; and that the actual cash value of the certain sample cases and trays referred to in the preceding paragraph was $914.50.

VII.

That it is true, as alleged in paragraph VI of plaintiff's complaint, that on the 3rd day of December, 1954, the plaintiff suffered and sustained a complete and total loss of that certain jewelry of the value of $25,360.01 and those certain sample cases and trays of the value of $914.50; and that such loss occurred by reason of the theft of such property in the County of Los Angeles, State of California. That the plaintiff's jewelry and sample cases and trays were stolen from the trunk of plaintiff's automobile at a time when the plaintiff was in such vehicle.

VIII.

That it is true, as alleged in paragraph VII of plaintiff's complaint, that on the 3rd day of December, 1954, immediately after said theft occurred, plaintiff gave defendant immediate notice thereof in writing. That on the 21st day of January, 1955, plaintiff rendered and delivered to defendant a proof of loss of said property, therein fully describing said property which was lost and the amount

of such loss, and that on said 21st day of January, 1955, plaintiff made claim and demand upon defendant for the payment of said loss; all of which was done and performed by plaintiff in the manner and as provided by the terms and conditions of said contract of insurance; and the plaintiff also has performed all obligations imposed upon him under the terms of such contract of insurance.

IX.

That it is true, as alleged in paragraph VII of plaintiff's complaint, that the defendant failed, neglected and refused to perform the terms, conditions and agreements of its contract of [64] insurance and has failed to pay to plaintiff the value of his jewelry and sample cases and trays, or any part thereof.

X.

That it is true, as alleged in the so-called "Third Defense" of defendant's answer, that the contract of insurance provided an exception to coverage as follows:

> "* * *. (i) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2

hereof, or in the custody of the Post Office Department as first class registered mail."

XI.

That it is true that plaintiff's jewelry and sample cases and trays were stolen from plaintiff's automobile, but it is not true, as alleged in the so-called "Third Defense" of defendant's answer that said jewelry and sample cases and trays were taken "at a time when neither the assured (the plaintiff) nor a permanent employee of the assured nor a person whose sole duty it was to attend the vehicle, was actually in or upon such vehicle."

XII.

That it is true, as alleged in the so-called "Fourth Defense" of defendant's answer, that the contract of insurance provided an exception to coverage as follows: [65]

"* * * (M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken; nor for loss of or damage to goods when sent 'C.O.D.' with the privilege of inspection by the consignee before delivery."

XIII.

That it is not true, as alleged in the so-called "Fourth Defense" of defendant's answer, that

plaintiff's loss was an unexplained loss or mysterious disappearance, and it is not true that plaintiff's loss was an "unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory."

XIV.

That it is true, as alleged in the so-called "Fifth Defense" of defendant's answer, that the contract of insurance in question provides as follows:

"8. It is a condition of this insurance that:

"(A) The Assured will maintain a detailed and itemized inventory of his or their property and separate listing of all travelers' stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company."

XV.

That it is not true, as alleged in the so-called "Fifth Defense" of defendant's answer, that the plaintiff did not maintain a detailed and itemized inventory of his property as provided in the clause quoted in said so-called "Fifth Defense." [66]

XVI.

That the allegations contained in the so-called "Sixth Defense" of defendant's answer are true.

XVII.

That under the terms of paragraph 15 of the so-called "insuring conditions" of the contract of insurance in question, the defendant's obligation, if

any, to plaintiff was payable sixty days after proof of loss was received by the defendant. That a satisfactory proof of loss was received by defendant not later than January 23, 1955.

And as conclusions of law from the foregoing facts the Court finds:

Conclusions of Law

I.

That, contrary to the allegation made by defendant in the so-called "Second Defense" of its answer, the plaintiff's complaint states a claim on which relief can be granted against defendant.

II.

That the plaintiff's loss was not excluded from coverage under the contract of insurance in question by reason of the matters set forth in the so-called "Third Defense" of defendant's answer.

III.

That the plaintiff's loss was not excluded from coverage under the contract of insurance in question by reason of the matters set forth in the so-called "Fourth Defense" of defendant's answer.

IV.

That plaintiff's loss was not excluded from coverage under the contract of insurance in question by reason of the condition set forth in the so-called "Fifth Defense" of defendant's answer. [67]

V.

That while the actual cash value of the jewelry lost by plaintiff on December 3, 1954, was $25,360.01, the liability of defendant for said loss is limited to $15,000.00 by reason of the contractual "Limitations of Liability" set forth in the so-called "Sixth Defense" of defendant's answer.

VI.

That the defendant is indebted to plaintiff in the sum of $15,000.00 for the loss to plaintiff of plaintiff's said jewelry on December 3, 1954.

VII.

That defendant is indebted to plaintiff for the actual cash value of the sample cases and trays lost on December 3, 1954, the said value being $914.50.

VIII.

That the plaintiff is entitled to judgment against defendant for the sum of $15,914.50, together with interest at the rate of 7% per annum from the 24th day of March, 1955, until date of judgment and for costs of suit.

Let judgment be entered accordingly.

Dated: May . . . 1956.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed May 1, 1956. [68]

In the District Court of the United States, Southern District of California, Central Division

No. 18517-TC

DAVE SCHNEIDER, Doing Business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Plaintiff,

vs.

CENTENNIAL INSURANCE COMPANY, a Corporation,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial in the above-entitled court, before Honorable Thurmond Clarke, Judge Presiding, and having been tried on March 26th and 27th, 1956, before the Court, sitting without a jury, a jury trial having been waived by the respective parties, plaintiff appearing by his attorneys, Betts, Ely & Loomis and Samuelson & Buck, by Walter Ely and C. Ransom Samuelson, and the defendant appearing by its attorneys, Hauerken, St. Clair & Viadro, by George H. Hauerken, and evidence, both oral and documentary, having been introduced, and the cause submitted for decision, and the Court having heretofore [70] made and caused to be filed herein its written findings of fact and conclusions of law and being fully advised, Now, Therefore,

It Is Ordered, Adjudged and Decreed, that plaintiff, Dave Schneider, doing business as Dave

Schneider Wholesale Jewelry, shall have and recover of and from the defendant, Centennial Insurance Company, a corporation, the sum of $15,914.50, plus interest thereon at the rate of 7% per annum from March 24, 1955, until the date hereof, the amount of such interest being $.....

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Dave Schneider, doing business as Dave Schneider Wholesale Jewelry, shall have and recover of and from the defendant, Centennial Insurance Company, a corporation, his costs and disbursements incurred herein in the sum of $32.75.

Dated: This .. day of May, 1956.

/s/ THURMOND CLARKE,
Judge of the United States
District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1956.

Docketed and entered May 1, 1956. [71]

[Title of District Court and Cause.]

STAY OF EXECUTION

Upon the application of defendant and good cause appearing therefor, it is hereby ordered that execution of the judgment heretofore made and entered herein against defendant be, and the same hereby is, stayed until ten (10) days after determination

by this court of the motion for a new trial filed by defendant.

Dated: May 8, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed May 8, 1956. [73]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL AND MOTION TO MAKE NEW FINDINGS AND CONCLUSIONS AND DIRECT THE ENTRY OF A NEW JUDGMENT

Defendant moves the court for a new trial under the provisions of Rule 59(a) of the FRCP.

In connection with and as a part of this motion, defendant also moves the court to make new findings and conclusions and enter a new judgment in favor of defendant as provided in said Rule 59(a).

The motions are made on the ground that there is no evidence to support the findings, conclusions and judgment made and entered in favor of plaintiff, and that the only findings, conclusions and judgment that would be supported by the evidence would be findings, conclusions and a judgment in favor of defendant.

The particulars wherein the evidence is claimed to be insufficient to support the judgment in favor of

plaintiff and to be sufficient only to support a judgment in favor of defendant [74], are as follows:

Plaintiff testified that he locked the cases in the trunk of his automobile at approximataely 2:45 p.m. He further testified that he made two stops thereafter and that, after making a third stop, at approximately 4:30 p.m. he discovered that the jewelry was missing from the trunk of his automobile. He finally testified that he did not have the slightest idea of how the jewelry disappeared.

The foregoing testimony did not make out a prima facie case of coverage under the policy. On the contrary, it affirmatively established that the loss was excluded from the coverage of the policy.

Copies of two orders proposed by defendant are attached hereto.

Dated: May 7, 1956.

/s/ GEORGE H. HAUERKEN,

HAUERKEN, ST. CLAIR & VIADRO,

Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed May 8, 1956. [75]

[Title of District Court and Cause.]

MINUTES OF THE COURT
July 16, 1956

Present: Hon. Thurmond Clarke, District Judge.
Counsel for Plaintiff: Walter Ely.
Counsel for Defendant: Geo. H. Hauerken.

Proceedings:

For hearing motion of defendant for new trial, and motion to make new findings and conclusions and to direct entry of new judgment, filed May 8, 1956.

Attorney Hauerken makes a statement of his motion.

Attorney Ely makes a statement in opposition.

Court Orders cause as to said motions taken on submission.

JOHN A. CHILDRESS,
Clerk. [81]

[Title of District Court and Cause.]

MINUTES OF THE COURT
July 18, 1956

Present: Hon. Thurmond Clarke, District Judge.
Counsel for Plaintiff: No appearance.
Counsel for Defendant: No appearance.

Proceedings:

Ruling on submitted matter:

It Is Hereby Ordered that the Motion of Defendant for New Trial and to Make New Findings and to Direct Entry of New Judgment heretofore heard and submitted on 7-16-1956, be, and hereby is denied.

Counsel notified.

JOHN A. CHILDRESS,
Clerk. [82]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Centennial Insurance Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 1, 1956.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, ST. CLAIR & VIADRO,
Attorneys for Defendant.

[Endorsed]: Filed July 25, 1956. [83]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL AND DOCKET APPEAL

Good Cause Appearing Therefor, It Is Hereby Ordered that the time within which to file the record on appeal and docket the appeal in the United States Court of Appeals for the Ninth Circuit be, and the

same hereby is, extended to and including October 24, 1956.

Dated: September 27, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed September 27, 1956. [86]

In the United States District Court, Southern District of California, Central Division

No. 18517-TC Civil

DAVE SCHNEIDER, Doing Business as DAVE SCHNEIDER WHOLSALE JEWELRY,

Plaintiff,

vs.

CENTENNIAL INSURANCE COMPANY, a Corporation,

Defendant.

Honorable Thurmond Clarke, Judge Presiding.

TRANSCRIPT OF TESTIMONY

March 26, 1956

Appearances:

For the Plaintiff:
BETTS, ELY & LOOMIS; and
SAMUELSON AND BUCK, by
WALTER ELY, ESQ., and
C. RANSOM SAMUELSON, ESQ.

For the Defendant:
GEORGE H. HAUERKEN; and
HAUERKEN, ST. CLAIR & VIADRO, by
GEORGE H. HAUERKEN, ESQ.

Monday, March 26, 1956, 1:30 P.M.

The Court: All right.

The Clerk: No. 18517-TC Civil, Dave Schneider Wholesale Jewelry vs. Centennial Insurance Company, for trial.

Mr. Ely: May I inquire of counsel through your Honor whether there is any desire to make a record of his motion to invoke the exclusionary rule?

Mr. Hauerken: No.

Mr. Ely: We will call Mr. Schneider, the plaintiff in this action.

DAVE SCHNEIDER

the plaintiff, called as a witness in his own behalf, being first duly sworn, on his oath testified as follows:

The Clerk: State your full name, please.

The Witness: Dave Schneider.

Direct Examination

By Mr. Ely:

Q. Mr. Schneider, you are the plaintiff in this action? A. Yes, sir.

Q. What is your business, occupation, or profession?

(Testimony of Dave Schneider.)

A. I am a traveling salesman, wholesale; I own the business and I also travel.

Q. What kind of business? [3*]

A. It is jewelry.

Q. Do you do business under the name of Dave Schneider Wholesale Jewelry?

A. That is right.

Q. Are you the sole owner of the business?

A. Yes, sir.

Q. Where is your office located?

A. At 205 East Broadway in Long Beach, second floor, room 207.

Q. How long have you been engaged in that business at that location?

A. Approximately ten years.

Q. In connection with your business, did you have occasion to purchase, through Jack Grand, an insurance policy to cover possible losses of your merchandise? A. I did.

Mr. Ely: May I approach the witness, your Honor?

The Court: Yes; certainly.

Q. (By Mr. Ely): I show you what purports to be an insurance policy issued by Centennial Insurance Company; on the front sheet of it: "Centennial Insurance Company," dated September 1, 1954, purporting to insure Dave Schneider, dba Dave Schneider Wholesale Jewelry, and ask you if that is an insurance policy which you purchased on or about the date indicated? [4] A. Yes, sir.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Dave Schneider.)

Mr. Ely: Your Honor, you may look at the front of it while the clerk is gone. I propose to offer it as plaintiff's exhibit first in order.

The Court: Yes.

Mr. Ely: I noticed thereon the premium of some five or six hundred dollars—I have forgotten the exact figure, Mr. Schneider.

Does your Honor notice it right at the top there?

The Court: Yes; $597.21.

We will make this Exhibit 1. Any objection?

Mr. Hauerken: No objection. I would like to check it with the copy, to see that it is a copy.

Mr. Ely: Yes.

May we offer it subject to any motion to strike the defendant may have, in the event they question it?

The Court: Yes.

Mr. Hauerken: Can we have admitted the policy in the pleadings?

The Court: Yes. They just want to make it an exhibit.

(The document referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

Q. (By Mr. Ely): With respect to this premium of five hundred ninety-seven dollars and some odd cents, was it paid? A. Yes. [5]

Q. Following the date of the issuance of tha policy, which I believe was September 1, 1954, did you sustain a loss of merchandise in your business?

A. You mean following that?

(Testimony of Dave Schneider.)

Q. Yes. A. No; after that.

Q. I say, following that or after that date?

A. Yes.

Q. And on what date did you sustain a loss?

A. December 3, 1954.

Q. What did you lose?

A. I lost my sample cases, and inside were this merchandise.

Mr. Ely: In the interest of time, your Honor, if I may lead for just a couple of questions?

The Court: Yes.

Q. (By Mr. Ely): You had been out to display your wares on that day; is that correct?

A. That is correct.

Q. And from place to place you were transporting the merchandise in the car; is that correct?

A. Yes, sir.

Q. Do you actually know, of your own knowledge, whether this merchandise was stolen while you were moving in your car or while you were stopped at a stop sign or any other specific [6] place?

A. No, sir; I don't.

Q. Following the loss, did you make a claim to the Centennial Insurance Company for reimbursement under your contract with that concern?

A. Yes, sir.

Q. Did you file a sworn proof of loss?

A. Yes, sir.

Mr. Ely: May I approach the witness and hand him this, your Honor?

(Testimony of Dave Schneider.)

The Court: Yes.

Mr. Ely: What purports to be a——

The Court: Your company admits it through the file?

Mr. Hauerken: That is right.

The Court: So we can make it Exhibit 2.

Mr. Ely: I shall, your Honor.

(The document referred to, marked Plaintiff's Exhibit No. 2, was received in evidence.)

Q. (By Mr. Ely): Was that Exhibit 2, which I show you, Mr. Schneider, prepared by you or under your direction? A. Yes, sir.

Q. Will you kindly examine it and tell us whether or not you can tell his Honor what the amount or the value, the cost value, to you was of the merchandise which was stolen from you on December 3, 1954? [7]

A. Well, approximately—Does that include the cases?

Q. Let's include the cases, first, and then we will separate them.

A. It was approximately——

Q. I don't want an approximation.

A. I have it right here; it was $26,274.51.

Q. Does the document which you have before you list in complete detail each and every item which was taken? A. Yes.

Q. How much of your loss was trays?

Mr. Ely: I may explain that the policy only

(Testimony of Dave Schneider.)

covers trays up to $2,000, and separates them from the jewelry.

The Court: All right.

Q. (By Mr. Ely): How much of your loss was made up of the cost value to you of the trays?

A. It was $914.50.

Q. And the other part of that twenty-six thousand and some odd dollars worth of material, then, would be the jewelry and so forth?

A. Yes, sir.

Q. How do you know the value of this merchandise, Mr. Schneider?

A. Well, we have an inventory for that purpose.

Q. In the office?

A. Yes, sir; and we have invoices to prove it. [8]

Q. Did you make available to this insurance company and its representatives your books for examination? A. Yes, sir.

Q. To check against those items?

A. Yes, sir.

Q. And was that examination made?

A. Yes, sir; it was.

Q. At all times during this particular day, December 3rd, when you sustained this loss, were you traveling here in Los Angeles County?

A. In the county; yes, sir.

Mr. Ely: You may cross-examine.

I believe we offered the claim.

The Court: Yes; we have the claim as Exhibit 2.

The Clerk: Exhibit 2 in evidence.

Mr. Ely: I may say, Mr. Hauerken, you might

(Testimony of Dave Schneider.)

have had an opportunity to compare the copy which is now Exhibit 2 with the original.

It may be understood that it is offered subject to a motion to strike on his part if he finds that it is not accurate.

The Court: Yes; during the recess Mr. Hauerken may check both exhibits. [9]

Cross-Examination

By Mr. Hauerken:

Q. Mr. Schneider, in the proof of loss that you submitted to the insurance company, you stated:

> "On December 3, 1954, said assured gave immediate notice to said Centennial Insurance Company relating how said loss occurred, which was prepared by said company's agents, Ed Knight and John Osti, and on December 3rd, 1954, same was signed by assured and delivered to said agents and company * * *"

I am going to show you a written statement——

Mr. Hauerken: May I approach the witness, your Honor?

The Court: Yes; certainly.

Q. (By Mr. Hauerken): ——which is dated December 3, 1954, all three pages, and appears to bear an initial "D. S." on the first two pages, and appears to bear the name "David A. Schneider" on the third page; would you look at that, please?

A. Yes. Do you want me to read the whole thing?

(Testimony of Dave Schneider.)

Mr. Ely: I can stipulate to it, your Honor.

Mr. Hauerken, you may offer it, if you wish, without laying any foundation.

The Court: Did the defendant say the plaintiff signed it?

The Witness: Yes. [10]

Q. (By Mr. Hauerken): Did you sign that statement? A. Yes.

Q. Is that the statement you gave Mr. Knight and Mr. Osti on December 3rd, as you said in your proof of loss? A. Yes.

Mr. Hauerken: I would like to offer this in evidence.

The Court: Yes; Defendant's Exhibit A.

(The document referred to, marked Defendant's Exhibit A, was received in evidence.)

The Court: Do you want to question him about it?

Mr. Hauerken: Yes, your Honor.

Q. Mr. Schneider, do you recall that on March 17, 1955, you were examined under oath pursuant to a request for examination under oath made under and pursuant to the terms of your policy?

A. Whereabouts was this at?

Q. Well, this examination, if you recall, was in Mr. Knight's office in Long Beach?

A. Yes; I do.

Q. Do you recall being at Long Beach and being in Mr. Knight's office and being sworn by a notary and shorthand reporter present? A. Yes.

(Testimony of Dave Schneider.)

Q. Your attorney was present?

A. Not this particular one, but another one [11] was.

Q. Your other attorney? A. Yes.

Q. And I was present? A. Yes.

Q. And questions were propounded, and answers given by you? A. Yes.

Q. And that was transcribed into writing?

A. Yes.

Q. And you recall signing that writing before a notary public? A. Yes.

The Court: Do you want to offer that deposition?

Mr. Ely: That is not a deposition, your Honor. I am not sure it is admissible. There is going to be a lot of cluttering up of the record. Of course, if there is anything impeaching in it, the gentleman is entitled to call his attention to it.

The Court: I will let it be received. It was taken under oath. His attorney and a reporter were present.

Mr. Ely: That is true.

The Court: If there is anything he wants to examine the witness about it, he may.

Mr. Ely: I don't question that.

The Court: I think it is a practical matter whether it [12] should go in. I will make it Defendant's Exhibit B.

You have a copy, don't you, Mr. Ely?

Mr. Ely: Yes, your Honor. It is awfully long.

(The document referred to, marked Defendant's Exhibit B, was received in evidence.)

(Testimony of Dave Schneider.)

Q. (By Mr. Hauerken): Do you recall, Mr. Schneider, that after you read the transcription of your testimony and before you had signed it, that you caused to be prepared two pages which had to do with reference to your testimony on pages 16 and 22? A. Yes.

Q. Making certain changes or corrections?

A. Yes.

Mr. Hauerken: I will come back to them later, your Honor.

The Court: Yes.

Q. (By Mr. Hauerken): Now, Mr. Schneider, you travel about in your car and have your jewelry samples with you, do you not? A. Yes.

Q. And the jewelry cases that you stated were lost, would you describe them, please?

A. Well, they're about three and a half to four feet in height, and they are about, oh, I would say about seven or eight inches wide, or nine inches wide—it is pretty hard [13] to tell you right off-hand; I never really measured them—and it has three widths: it has a side width and it has a top width, and one width across, could be about 24 inches in breadth. You see, it had a length, a breadth—it has actually three lengths to it, or two widths and one length.

Q. Do you recall testifying on your examination under oath that they are about four and a half feet tall and a good thirty inches in width one way and twenty inches in depth another way? A. Yes.

Q. Would that be substantially correct?

(Testimony of Dave Schneider.)

A. That would be substantially correct; yes.

Q. Would you tell me their approximate weight empty?

A. Empty? I would say they weigh about 25, 26, 27 pounds, something like that.

Q. Empty? A. Yes; empty.

Q. Was each case full of merchandise?

A. Yes, sir.

Q. How much did each case weigh on December 3, 1954?

A. Approximately about 65 pounds apiece.

Q. Are they on wheels to make it more easy for you to get them about?

A. Yes, sir; they are.

Q. You were driving about that day in a [14] Cadillac automobile? A. Yes, sir.

Q. What year model Cadillac?

A. 1954 Coupe.

Q. When had you bought it?

A. What year did I buy it? I bought it in 1954. I bought it previous to that, about six months previous to that.

Q. You had that car about six months then?

A. Yes.

Q. What type of Cadillac was it?

A. It was a Coupe de Ville.

Q. And when you traveled about, where did you put these cases?

A. In the trunk, which is the back.

Q. The rear trunk compartment?

A. The rear trunk compartment.

(Testimony of Dave Schneider.)

Q. During the six months you had the car, and when you were in your place of business, did you park the car in the street or did you park it in a parking lot? A. Parking lot.

Q. How far from your place of business was that parking lot? A. You mean in footage?

Q. Yes; half a block or——

A. Half a block. [15]

Q. Open parking lot?

A. Open parking lot.

Q. When you left the car in that parking lot during that six-month period, did you always leave your keys in the car?

A. Yes; it was a rule of the parking lot.

Q. Did you have any duplicate key around the car? A. Yes; I did.

Q. Where do you keep that?

A. In one of the taillights.

Q. In the Cadillac, the plastic on one of the taillights lifts up, and you put in gasoline; is that right? A. Yes.

Q. And the other plastic, under the taillight, you could lift that up, and you kept a spare key in there?

A. I kept it in the one that was stationary.

Q. In the one that was stationary, on the right-hand side? A. That is right.

The Court: How did you get into that?

The Witness: They unscrew. You unscrew them, you know; where the light goes in, there is a little bolt, and you take a key and knock that little inside part and that makes a large hole. You put your

(Testimony of Dave Schneider.)

screw right through in one, right up against it. I put one on each side of it. [16]

Q. (By Mr. Hauerken): Did you use the same key for the ignition of your car as you did for the trunk in back?

A. No, sir; I used a separate key.

Q. Did you leave that key on your keyring?

A. Yes.

Q. So, when you left your car in the parking lot, your keyring also has a key to your trunk?

A. Yes.

Q. In that manner, you stored your car in an open parking lot for a period of about six months prior to this?

A. In and out. I never stored it in there during the night; just during the day when I was working.

Q. But your car would be in that parking lot many times by the hour during the day?

A. Yes.

Q. Do you have any knowledge as to whether or not anyone made any duplicate of your automobile key during that six-month period?

A. I would have no way of knowing.

Q. In this statement that you gave to Mr. Knight on December 3, 1954—and that is the date of this alleged loss, is it not? A. Yes.

Q. You gave this to Mr. Knight within an hour or two after you discovered this loss; is that [17] correct? A. Approximately two hours; yes.

Q. Do you recall telling Mr. Knight, about three weeks prior to December 3, 1954, that you "noticed

(Testimony of Dave Schneider.)

a Cadillac evidently following me from Long Beach to a stop in Hermosa Beach, and I made the stop and noticed that the car parked across the street. I was in this store at this stop for about five hours and decided that if the car were there when I came out I would call the police. I did not take any license number of this car since at first I thought it might have been a coincidence, and when I came out the car was gone." Do you recall stating that?

A. Yes, sir; I did make that statement.

Q. Do you recall at any time informing Mr. Knight or anyone else that there had been a number of robberies from automobiles of jewelry salesmen at about that time?

A. I don't know whether I told him there was a number. I told him I knew of one or two.

Q. You knew of some, didn't you?

A. Yes, sir.

Q. You knew jewelry salesmen were particularly vulnerable at that time?

A. I didn't know they were vulnerable. I didn't know it could happen to me or anybody else. But I knew a couple of cases that did happen.

Q. Before this December 3, 1954, incident? [18]

A. Yes.

Q. When you put these sample cases in your trunk, when you left your place of business that morning, did you lock the trunk?

A. I closed it.

Q. Is it a catch lock?

(Testimony of Dave Schneider.)

A. It is a catch lock; yes, sir.

Q. Do you recall whether or not you tried the lock on that morning when you left your place of business?

A. Well, I always try it. But to the best of my ability or my knowledge, it was locked.

Q. Is there a type of spring arrangement on your Cadillac automobile that if the lock is not in position or not secure that the back will come up?

A. Well, it will over a period of about a block.

Q. Do you recall stating in your deposition under oath that in driving the car around that day that the back did not come up that day at all?

Mr. Ely: I object to that question, first, on the ground that it is not a deposition, your Honor. As far as I know, there has been no deposition. Secondly, I feel that either the witness or counsel is entitled to be advised what document and where counsel purports to be reading from.

The Court: Yes; you might tell him.

Mr. Hauerken: I thought I said in his examination under [19] oath, your Honor.

The Court: I will let him answer. I will overrule the objection.

Do you recall making such a statement?

The Witness: Would you mind repeating that again, sir?

The Court: Would you mind giving him the page number, so Mr. Ely might check it?

Q. (By Mr. Hauerken): Well, do you recall—Let me ask you the direct question:

(Testimony of Dave Schneider.)

While you were driving the car around on that day at any time, did you ever see the back come up?

A. Well, I didn't see it come all the way up. It could have come up a little ways and me not know it.

Q. I am asking you, when you were driving the car around that day, did you ever see the back come up?

A. Not all the way. I don't really remember seeing it come up.

Q. Did you see it come up any part of the way?

A. No; I didn't.

Q. Isn't it a fact that, as you are driving along in your car, if the back comes up, that is immediately evident to you in your rearview mirror?

A. Well, not necessarily. The only way I could see it in my rearview mirror, if it came up all the way.

Q. In any event, you left your place of business at [20] about 10:00 o'colck in the morning?

A. Yes, sir.

Q. And from there you went to a place on East 103rd Street; is that correct?

A. Yes, sir.

Q. The name is Watts?

A. That is the name of the town, Watts. The name of the store was Martin's.

Q. Did you show your line of merchandise—at Martin's, you say? A. Yes, sir.

Q. Did you show your line of merchandise at this first stop? A. Yes; I did.

Q. When you say showing your line of merchan-

(Testimony of Dave Schneider.)

dise, that meant you had to open the back of your car, take your two sample cases out of the car, and take them into the store? A. Yes.

Q. Do you recall that distinctly?

A. Yes, sir.

Q. What time did you leave Martin's that morning?

A. I left there approximately about twelve o'clock.

Q. Do you recall putting the sample cases back into the car then? A. Yes; I did. [21]

Q. When you went into this Martin's place—is that a street location? A. Yes, sir; it is.

Q. You had both cases in there with you during that time? A. Yes, sir.

Q. And you wheeled the samples back out, and I understand then you locked the trunk with the samples in it? A. I closed it.

Q. During the morning and before you left this Martin's place at Watts, did you have occasion to go into the bathroom, anything of that nature?

A. While I was there at the store?

Q. Yes. A. No, sir; I didn't.

Q. You had gone to the bathroom before you left your place of business, I take it?

A. Yes.

Q. And from the time you went into Martin's you were continuously in the car or had the samples with you in Martin's place.

A. Yes, sir; I did.

(Testimony of Dave Schneider.)

Q. After you left Martin's, what did you do?

A. Well, I drove from there to a place over on Manchester called, I think it was, Smith's Wood Barbecue—it is [22] a cafe.

Q. You went in there to have lunch?

A. Yes, sir.

Q. Did you leave the cases in your car at that time? A. I did.

Q. How long were you in having lunch?

A. I would say about fifteen minutes.

Q. Where was your car parked at that time?

A. It was parked right on the sidewalk—I mean, not on the sidewalk; right adjacent to the curbing. And this particular place has an open front; it is a glass enclosure, and they have little booths that line right up against the window, and they have a counter. I never eat there unless I can put it right in this particular parking space. I was seated right up to the plate glass, and my car couldn't have been over five or six feet away.

Q. This matter of keeping your car in view at all times was extremely important to you, wasn't it? A. Surely.

Q. You were quite aware of the condition of your policy in connection with loss from an automobile, weren't you? A. That is right.

Q. And you had that uppermost in your mind at all times? A. I have always had.

Q. You did at that time? [23] A. Yes.

Q. And you kept your car in view the entire time? A. Yes, sir.

(Testimony of Dave Schneider.)

Q. If I understand correctly, you did not go into the bathroom to wash your hands or for any other purpose?

A. Of course, when I went into the restaurant, I had my back turned until I got in and turned around and sat down. That is the only time I didn't have it in view.

Q. From there you went to the Bruce Jewelers; is that correct? A. Yes, sir.

Q. Where is that situated?

A. You mean the exact address? I think it is either 111—is that correct? Do you have it there? It is in Inglewood.

Q. 119 North Market Street? A. Yes.

Q. And where, what locality, what city or town?

A. It is in Inglewood.

Q. And you showed your goods there, didn't you?

A. Yes.

Q. You remember that distinctly?

A. Yes, sir; I do.

Q. Do you remember parking in front of Bruce's? A. Yes; diagonally. [24]

Q. You took your goods out of the car?

A. Yes.

Q. And took your sample cases and wheeled them into the store? A. Yes, sir; I did.

Q. With whom did you deal there?

A. Dan Bruce; he is the proprietor, one of the proprietors.

Q. What time did you leave Bruce's?

A. I would say I left there about two o'clock.

(Testimony of Dave Schneider.)

Q. And from the time you left the luncheon place until the time you left Bruce's Jewelry, did you go in to wash your hands or into the bathroom for any other purpose?

A. No, sir; I didn't.

Q. Did you put the cases back in the car again at Bruce's A. Yes, sir; I did.

Q. You are sure of that?

A. I am positive I did.

Q. And did you lock the trunk when you left Bruce's?

A. I closed it. It is a catch lock. You don't have to lock it.

The Court: He says it locks automatically.

Mr. Hauerken: Yes.

Q. From Bruce's you went on over to the Joy Jewelry [25] Company? A. Yes.

Q. Did you make any stops en route?

A. No.

Q. Where is the Joy Jewelry Company located?

A. That is about a block and a half from there, maybe two blocks, and it is in Inglewood.

Q. A very short trip?

A. Yes, sir. However, it took me about, I would say, fifteen minutes to get over there, because there is a lot of traffic, especially at that time of year or that month, and I had to drive around the block to get around to the front of it, because I was going north—no, south—and I would have to drive around so I could park parallel and actually would have to be going north so I could park the other way.

(Testimony of Dave Schneider.)

Q. How long did it take you to get from Bruce's to Joy's? A. About fifteen minutes.

Q. Do you know whether or not the cases were stolen from your car during that trip?

A. I have no way of knowing.

Q. On the trip from Bruce's to Joy's, did you see the back of your car go up?

A. No; I couldn't possibly see it.

Q. It would show up in your rearview mirror, wouldn't [20] it?

A. Well, only if it went up all the way; yes.

Q. When it lets go as you are driving along the street, doesn't it always go all the way up?

A. It takes a little time for it to go all the way up. You have to jog along and it has to raise up.

Q. To your knowledge, up to December 3, 1954, has your lock ever become loose so that your back did go up?

Mr. Hauerken: I will withdraw that.

Q. Did you ever have any trouble with the back lid or the lid to your trunk compartment of your car up to December 3, 1954, the thing coming upen while you are driving along?

A. Not to my knowledge; no.

Q. And you don't know that you had any trouble that day, do you? A. No; I don't.

Q. The nature of the mechanism is such that if the lock becomes disengaged, the trunk lid goes up all the way, doesn't it?

A. Yes; over a period of a little space.

(Testimony of Dave Schneider.)

Q. And that would completely block your vision through the rear window of your car?

A. If I was looking.

Q. You drive by looking through your windshield and your rearview mirror, don't you? [27]

A. Not continually.

Q. You mean to suggest to the court that if your trunk lid came up, completely blocking your rear view from the back of your car, you would not have noticed that?

A. If it was blocking, yes: I would, providing I was looking.

Q. But you actually did not notice that occur on the trip from Bruce's to Joy's A. No, sir.

Q. Nor did you notice that occur at any other time that day, did you? A. No, sir.

Q. You don't know whether or not the cases were stolen during the trip from Bruce's to Joy's do you?

A. No, sir; I don't know.

Q. Did anything out of the ordinary occur on the trip from Bruce's to Joy's? A. No, sir.

Q. You were in movement the entire time?

A. Yes, sir; except for traffic lights.

Q. Do you recall saying on your examination under oath that you were under movement all of the time from Bruce's to Joy's?

A. If I were, I probably had to slow up. I don't recall whether there was a traffic light there then or not. But [28] there is one down at the corner as you pass Bruce's. I mean, technically, if that is what

(Testimony of Dave Schneider.)

you want. I don't remember whether I stopped for it or whether it was green.

Q. I think you said—correct me if I am wrong—that if the back had gone up during that trip or any other trip, you would have seen it?

A. If it went up all the way; yes, sir.

Q. You parked in front of the Joy Jewelry Company?

A. Not exactly in front; maybe a car space below it.

Q. The Joy Jewelry Company is a ground-floor location? A. Yes, sir.

Q. About how wide a frontage do they have at the Joy Jewelry Company?

A. They have two stores; one is a gift shop, one is a jewelry shop. I couldn't tell the frontage of the two places. Roughly speaking, it would probably be about 60 feet, something like that—45, something like that.

Q. Did you get out of your car and go into the Joy Jewelry Company?

A. I didn't go inside. I went to the doorway.

Q. Which doorway did you go to?

A. To the jewelry doorway.

Q. You never did go completely into the Joy Jewelry Company; is that correct?

A. No, sir. [29]

Q. Did you talk to someone at the Joy Jewelry Company? A. Yes; I talked to a salesman.

Q. Who was that?

(Testimony of Dave Schneider.)

A. It was a young fellow that was employed by them at that time. I don't recall his name.

Q. How far were you from your car at that time?

A. I would say 15 feet. I mean, technically speaking, I would say I never did really know exactly, but I could see it.

Q. Were you watching it?

A. Yes, sir; I was watching it.

Q. You were specifically watching your car?

A. Yes.

Q. You knew the high value of this merchandise there? A. Yes.

Q. And were alert to danger? A. Yes.

Q. Did you talk to Mr. Stelzer?

A. I asked this gentleman if Mr. Stelzer was in. He said, yes; he would go get him, and he did—he came to the doorway, and I talked to him.

Q. Did you take your cases out of the car then?

A. No, sir; I didn't.

Q. You had some conversation with Mr. Stelzer?

A. Yes. [30]

Q. It took place at a place elsewhere than in front of the store, did it not?

A. No, sir; I had my conversation there with him.

Q. Did you leave there and go someplace else with him?

A. Yes, sir. We got in the car and we drove around the block, made a complete circle. You see, I had to back out, so the car would be going north.

(Testimony of Dave Schneider.)

Then we made a turn, came around the back way, and there is a little alleyway at the back of his store.

Q. What did you go back there for?

A. He wanted to show me his car that he purchased for his wife.

Q. Could you draw a diagram of the location of the Joy Jewelry Company on South Market Street and the alleyway in back, and the location of Mr. Stelzer's car and where you placed your car?

The Court: Well, we will take the afternoon recess, and he can draw it on the blackboard.

(A recess.)

The Court: You had him draw on the blackboard.

Go ahead.

Mr. Hauerken: May I approach the witness, you Honor?

The Court: Yes.

Q. (By Mr. Hauerken): Mr. Schneider, you have drawn on the blackboard this little design here. Is it not so that on [31] the upper part of the blackboard this is an alley (indicating)?

A. Yes, sir. It doesn't go all the way; it stops about right there.

Q. Stops about here (indicating)?

A. Yes. It is a blind alley.

Q. About how wide is the alley?

A. I guess there is just about room for a car, is all.

(Testimony of Dave Schneider.)

Q. Just about one car? A. Yes.

Q. Are there any sidewalks?

A. Well, I think there is an empty lot out in the back, or something. I don't remember.

Q. Well, this is built right up to the property line on the lower side of the diagram?

A. Yes. It has a little curb.

Q. But is there a building on the upper side of this diagram?

Is that built right to the property line?

A. I am afraid I don't follow you.

Q. The street is how many feet wide?

A. You mean the back alley?

Q. Yes, this back alley. A. Wide?

Q. Yes. [32]

A. I don't know. About the width of a car, I should say, of a car, which would be about five feet.

Q. Let's say the width of a car is about five feet?

A. Yes.

Q. How wide is the alley then?

A. Probably about six.

Q. About six feet? A. Yes.

Q. There is a curb on each side of the alley?

A. No; just on the opposite side of the building.

Q. The curbing on the upper part of the diagram of the alley? A. Yes.

Q. Is there a building alongside the curb on the upper part of this diagram?

A. I just don't remember.

(Testimony of Dave Schneider.)

Q. Is there a sidewalk beyond the curbing to the upper part of the diagram here?

A. I don't remember that part either.

Q. You don't remember? A. No.

Q. What is the name of the street on which this —this is the Joy Jewelry here? A. Yes.

Q. What is the name of this street? [33]

A. Market Street.

Q. What is the name of the street on which this alley opens? A. I don't know.

Q. Well, is it——

The Court: Maybe you can help him.

Mr. Hauerken: I think I can, your Honor.

The Court: Do you know, Mr. Ely?

Mr. Ely: No, I don't know, your Honor.

Mr. Hauerken: I think I know.

Q. Is it Nutwood Street?

A. Could be.

The Court: He said it could be. So we will call it Nutwood.

Mr. Hauerken: All right.

Q. So, as I understand it, when you drove up in front of the Joy Jewelry Company and talked to Mr. Stelzer, you drove around the block and drove on up into the alley; is that correct? A. Yes.

Q. And drove your car immediately in back of Mr. Stelzer's Ford car? A. Yes, sir, I did.

Q. How far in back of Mr. Stelzer's Ford car were you?

A. I thought I was bumper to bumper, but I could have [34] been a foot away.

(Testimony of Dave Schneider.)

Q. Did you get out of your car?

A. Yes, sir, I did.

Q. Did you get into Mr. Stelzer's car?

A. I locked my car first, then I got into his car.

Q. When you say you locked your car, I don't understand. A. I locked the two doors.

Q. How far was the rear of your car into the alley from Nutwood Street?

A. I would say the tail end of it was sitting out on the sidewalk.

Q. Then this is not a very good diagram?

Mr. Ely: That is argumentative, if the court please.

The Court: Yes, I will sustain the objection.

Mr. Hauerken: This is by comparison. I don't mean to be argumentative, your Honor. I have a purpose in it.

The Court: It is the best he could do, for illustration.

Mr. Hauerken: I don't mean to judge him in drawing by this diagram.

The Court: All right. I will let you reframe it.

Q. (By Mr. Hauerken): By comparison, would it be a little better statement to say that the rear of your car was just about at Nutwood Street, and the other car was just inside?

A. Right by the sidewalk, yes. [35]

Q. By the sidewalk of Nutwood? A. Yes.

Q. So if we would put your car here and put the other car there (indicating), that would be a little closer to it? A. Yes.

(Testimony of Dave Schneider.)

Q. But you were immediately in back of him?

A. Yes, I was.

Q. And you got into Mr. Stelzer's car, did you?

A. Yes, sir.

Q. Did you sit in the driver's seat?

A. Yes.

Q. Were you watching your car?

A. Yes, I adjusted the rearview mirror so I could see it.

Q. Were you looking through the rearview mirror of Mr. Stelzer's car the whole time?

A. Well, off and on, after he was showing me the panel—it had quite a few things on it, up and down.

Q. You were looking at all the "gingerbread" on the panel of his new Ford, were you?

A. Yes, sir.

Q. How long were you sitting in Mr. Stelzer's car?

A. Couldn't have been over ten or fifteen minutes, if it was that long.

Q. And you were talking about the car? [36]

A. Maybe it was only ten minutes. Probably less. I didn't stay in there very long.

Q. You were looking at all the new gadgets on the dashboard? A. Yes, sir.

Q. And talking generally about the car?

A. Yes, sir.

Q. You couldn't see the back of your car at that time, could you?

A. Not very well, because the back was quite a

(Testimony of Dave Schneider.)

ways back, and the front was right up against the bumper.

Q. By the way, getting back to the trunk compartment of your automobile, and the lip on the trunk, coming down—I don't know exactly how to describe this. You have to put stuff down into the back of your car; something couldn't just slide out as you drive along, could it?

A. Not to my knowledge. I have sheet metal on the back.

Q. Well, how deep is it from the lip of the trunk, where the trunk comes down, to the floor of the trunk compartment of your car?

A. You mean the bottom part or the top part?

Q. The bottom part.

A. I would say it is about five inches.

Q. And when you put these two pieces in the back of [37] the car, did you lay them with the flat side down? A. Yes.

Q. And you put the one on top of the other?

A. No; side by side.

Q. So you stayed in Mr. Stelzer's car, you say, maybe ten or fifteen minutes?

A. Probably closer to ten minutes.

Q. Do you remember stating on your examination under oath that you were there about fifteen minutes?

A. Yes, I guess I must have said that. Of course, at that time I was quite nervous and I didn't really know exactly how long. I still say it was probably closer to only ten minutes.

(Testimony of Dave Schneider.)

Mr. Ely: What page, counsel?

Mr. Hauerken: Page 45, line 25.

Q. How long were you seated in the Ford?

A. Fifteen minutes, maybe less. I don't know that.

Q. Do you know whether or not these cases were stolen out of your car at that time?

A. I haven't any way of knowing.

Q. Did you check the trunk of your car at that time before you drove away, to see whether or not the cases had been taken out?

A. No, sir, I didn't.

Q. You just got in your car and left? [38]

A. Yes, sir.

Q. That was the Joy Jewelry at 252 South Market Street in Inglewood? A. Yes, sir.

Q. From there you went to the California Premium Service at 16611 Hawthorne Boulevard, Lawndale? A. Yes, sir.

Q. How long did it take you to get to the California Premium Service from the Joy Jewelry?

A. On this particular day there was quite heavy traffic and the roads were slick and the traffic was just letting out from the aircraft places of business. I would say it took me almost 45 minutes, which is very unusual.

Q. What time of day did you leave the Joy Jewelry?

A. I would say I left there about a quarter to 4:00.

Q. You say the cars were coming from the aircraft factories at the time?

(Testimony of Dave Schneider.)

A. Yes; traffic was very thick.

Q. Was it raining at the time?

A. It was just beginning to; the roads were slick.

Q. How far from Joy's to California Premium?

A. Oh, about four miles.

Q. And it took about 45 minutes?

A. Yes, sir.

Q. Between the time you left Bruce's—that is, before [39] Joy's, now—and the time of leaving Joy's, did you go to the bathroom for any purpose?

A. No, sir.

Q. Following up this bathroom thought, did you go to the bathroom at any time that day, for any purpose, between the time of leaving your place of business at ten o'clock in the morning up until after you discovered these missing cases somewhere around four or five o'clock in the afternoon?

A. Just before I left.

Q. And that is the only time you went near a bathroom? A. Yes.

Q. The rest of the time you were either in your car or, as you say, going in and out of the stores but having the car in view; is that correct?

A. Yes, sir.

Q. Was this a continuous drive from Joy's to the California Premium Service?

A. It was not continuous, because I was constantly stopping for traffic.

Q. Did you see the rear trunk lid go up at any time between Joy's and the California Premium Service?

A. I really was not watching. I was watching the

(Testimony of Dave Schneider.)

traffic up ahead. I didn't see anything. Of course, I wouldn't have any way of knowing, unless it went all the way up. [40]

Q. The trunk lid would have to be opened up rather wide to get those big cases out, wouldn't it, Mr. Schneider?

A. Not necessarily. He could slip them out if he raised that up about twelve inches.

Q. But if the trunk lid was raised up, I think you said you would see that?

A. Not if it were raised twelve inches, I wouldn't see it.

Q. Have you ever known a trunk lid to get open and go shut again of its own accord?

A. Not unless somebody shut it.

Q. Do you know whether or not the cases were stolen during the trip from Joy's to the California Premium Service?

A. That is the only place it could have been stolen, because I was watching it all the other time.

Q. I am asking if you know.

Mr. Hauerken: First of all, I ask that the answer go out as being nonresponsive, your Honor, and as being argumentative.

Mr. Ely: I submit it is responsive, your Honor. He is asking the witness, who is in the best position.

The Court: I will deny the motion to strike. I will let it remain.

Q. (By Mr. Hauerken): Was there anything unusual about the trip from Joy's to California Premium Service? [41]

(Testimony of Dave Schneider.)

A. Nothing unusual except we were riding bumper to bumper.

Q. Do you recall testifying in your examination under oath, at page 49, beginning at line 14:

"Q. I wonder if you could answer the question. Were they stolen during that trip?

"A. I don't know."

"Q. You can either say you don't know or no.

"A. I don't know."

Did you say that then? A. Yes.

Q. Is that the fact?

A. I still don't know.

Q. As a matter of fact, the loss of these cases is completely unexplainable to you: isn't that so?

A. Yes, sir; it sure is.

Q. Did you tell the police, immediately after you discovered the loss, that you really didn't know where it happened? A. Yes, sir.

Q. And is that the fact?

A. I still don't know where it happened.

Q. Did you tell the police, immediately after this occurrence, that you didn't see anything?

A. That is right. [42]

Q. And that is the fact, isn't it? A. Yes.

Q. And did you say on your examination under oath that you hadn't the slightest idea as to how or when this occurred?

Mr. Ely: What page, counsel?

Mr. Hauerken: 66—15.

Q. "Q. Let me ask you this. Can you explain how this loss occurred?"

(Testimony of Dave Schneider.)

And did you answer:

"I haven't the slightest idea. If I had any idea of how it happened I would have stopped it."

You said that, didn't you?

A. Yes, sir, I did.

Q. That is still your testimony?

A. Now that I think about it, I mean—may I talk?

Mr. Hauerken: Well, I think your own lawyer can bring that out, Mr. Schneider.

Mr. Ely: You can go ahead now.

If he has an explanation.

The Court: Well, Mr. Hauerken feels that he is only asking the questions. If you want to bring anything out, it is your responsibility.

Isn't that correct?

Mr. Hauerken: That is my feeling, your [43] Honor.

Q. Do you recall being asked, at page 66, line 19:

"Q. If you had been watching the car every minute of the day as you said you were, how would the stuff have been removed?

"A. I have had lots of sleepless nights on this myself, and I have woke up in the middle of the night trying to figure it out and I haven't the slightest idea of how it happened."

Do you recall being asked that question and giving that answer? A. Yes, at that time.

Q. And that was your feeling at that time?

(Testimony of Dave Schneider.)

A. Yes. But I have sure thought about it a lot since then.

Q. I didn't hear that.

A. I say, I have thought a lot about it since that time that it happened, and I kind of come to a little more reasoning.

Mr. Hauerken: That could possibly be a matter of conclusion.

Mr. Ely: Counsel doesn't want to hear that, so you must wait.

Mr. Hauerken: It is not that I don't want to hear that. I think you have to prove your own case.

Mr. Ely: Just a minute. My case has been proved. I [44] submit that the burden is on the defense now.

Mr. Hauerken: That is a matter of discussion. We will probably write a memorandum, your Honor. I have some thoughts on that.

The Court: We will proceed with the examination.

Mr. Hauerken: Yes.

Q. Do you recall, again——

Mr. Hauerken: Mr. Ely, at page 66, line 26, on to the next page.

Q. Do you remember that I asked you:

"Q. It is unexplainable to you, then?" You said, "To me it is unexplainable."

You recall my asking that question and your giving that answer on March 17th? A. Yes.

Q. That is, on March 17, 1955? A. Yes.

(Testimony of Dave Schneider.)

Q. And the date of this occurrence was December 3, 1954? A. Yes.

Q. I take it you thought a good deal on the matter between December 3, 1954, and the time of the taking of your examination under oath on March 17, 1955?

A. I have thought a lot about it since then, too.

Q. During that period of time you had employed the firm of—Samuelson and Buck, is it? Is that correct? [45] A. Yes.

Q. And did the firm of Samuelson and Buck assist you in preparing this proof of loss you filed with the company? A. No.

Q. They did not? A. No.

Q. Who assisted you in that?

Mr. Ely: I object to that.

No, go ahead.

Mr. Hauerken: I will let it go.

Mr. Ely: Go ahead.

Q. (By Mr. Hauerken): Before you went to this examination under oath, you consulted with Samuelson and Buck?

A. Which particular examination under oath?

Q. I am talking about the meeting in Mr. Knight's office at which Mr. Hengel was present, from the office of Samuelson and Buck?

A. Yes.

Q. And I was there and some other people?

A. Yes.

Q. You had employed counsel before that exami-

(Testimony of Dave Schneider.)

nation under oath? A. That is right.

Q. Do you recall being served with a letter?

Mr. Hauerken: May I approach the witness, your Honor? [46]

The Court: Yes, certainly.

Q. (By Mr. Hauerken): A rather lengthy legal letter, dated February 9, 1955, making demand for an examination under oath; do you recall that?

A. Yes.

Q. And you employed counsel? A. Yes.

Q. And you discussed with them the facts surrounding this occurrence? A. That is right.

Q. And had given the matter pretty good thought before you went to that examination under oath?

A. Yes, sir.

Q. Getting back to the California Premium Service, now—this is at page 49, line 19—you were being interrogated about the drive from Joy's to the California Premium Service; you were asked:

"Q. But in any event, you were driving along and didn't see the trunk compartment go up at any time?"

You anwsered, "That's right."

That question was propounded and that answer was given? A. Yes.

Q. That was the case? A. Yes. [47]

Q. Then you were asked:

"Q. This was a continuous"——

Mr. Ely: Your Honor—excuse me—in the interest of time, I thought I made it clear that we would stipulate that these were the answers given,

(Testimony of Dave Schneider.)

so that that question need not be repeated each time.

The Court: Well, yes, I don't think you need to do that each time.

Mr. Hauerken: My only purpose in doing this is—if I understand, this examination under oath is admitted in evidence?

The Court: That's right.

Mr. Hauerken: That's fine.

The Court: I admitted it over Mr. Ely's objection.

Mr. Hauerken: Well, that is fine. Then I won't—of course, I would ask one or two questions, if I may.

The Court: Certainly.

Mr. Hauerken: But I won't pursue this as fully as I would.

Q. You don't know whether the cases were stolen during that trip from Joy's to California Premium Service, do you?

A. I don't know. That is about the only place it could be, because I was watching it all the other time.

Q. Was there anything unusual on that trip?

A. Nothing unusual except I was riding bumper to [48] bumper.

Q. Was there anything unusual about it other than that?

A. I didn't notice anything, except that I was driving the car.

(Testimony of Dave Schneider.)

Q. When you got to the California Premium Service, you parked in front of the store?

A. The whole car, no; just the tail end.

Q. I don't understand that. For instance, what frontage does the California Premium Service store have? 25 or 50 feet? A. Yes, approximately.

Q. Which would it be? That is quite a difference? A. About 40 feet.

Q. Where is the entrance to the California Premium Service? Is it completely on one side?

A. Completely on one side.

Q. Where did you park your car with relation to the entrance to the California Premium Service store?

A. I would say the rear end to the entrance of my car would be about, oh, if you were to go this way, it would probably be about a foot away; but actually the distance from the entrance would probably be about four or five feet.

Q. I don't understand you. How wide is the sidewalk there? [49]

A. They don't have a sidewalk.

Q. There is no sidewalk? A. No.

Q. Did you drive up parallel to the store?

A. Well, there is a little dirt road there in between—a little dirt path, I should say.

Q. Would you draw a diagram of the front of the California Premium Service store and show me how it was?

A. I'm such a poor artist. (The witness steps to the blackboard and draws on the blackboard.) They

(Testimony of Dave Schneider.)

have a little crosswalk right in here. It is not really a walk; it is a little dirt road. And this is the entrance, this is the glass right here. Then it has a doorway, then it has a glass over here. This is open on this side, open on this side. The tail end of my car was probably right here. This is the car sticking out on this end, and this is the tail end. So I could see it maybe from the doorway, or I could see it from any part in the store.

Q. Put "C P" right where you feel the entrance to the California Premium store was.

A. I will put it on top, so you can see it (marking diagram).

Q. Put an "X" at the rear of your car.

A. (Witness marking diagram.)

Q. This is California Premium Service (indicating)? [50] A. Yes.

Q. Did you get out of your car when you got there? A. Yes.

Q. Was it raining at the time?

A. Yes, it was.

Q. Did you go over to the California Premium Service store—did you go in?

A. No, I was just at the doorway.

Q. Did you take the cases out?

A. No, sir, I didn't.

Q. Did I understand you to say that you did not go inside the California Premium Service?

A. I went in the doorway.

Q. Did you go inside the store?

(Testimony of Dave Schneider.)

A. You mean at this particular time you are talking about or later?

Q. Any time? A. Yes, I did.

Q. How long did you stay at the doorway without going in?

A. Just long enough to ask if Mr. Nigro was there.

Q. And then did you go in after that?

A. He came up and talked to me.

Q. Did you keep facing your car the whole time? A. Yes. [51]

Q. Why did you keep facing your car all the while? A. I was watching it.

Q. For what?

A. Why would anybody watch his car if he had that much merchandise in it?

Q. You did it because of the value and realization of the terms and conditions of your insurance policy; isn't that so?

A. Well, because I wanted to watch what was in it, too.

Q. Were you looking at your car all of the time?

A. Yes, sir, all of the time right there.

Q. Well, is there any difference to any other time?

A. Yes. Therewas a man and woman in the store, and they were looking at a diamond ring, and there was a little discrepancy there about quality of the stone, and Mr. Nigro was right there with me at the door, and he asked me if I would go and examine the stone, and I said that I would. He said that he

(Testimony of Dave Schneider.)

would look at my car or watch my car for me until I went over and looked at the stone.

I went behind the counter. Mr. Nigro was watching right there, looking at the car. It was visible.

Mr. Hauerken: Well, I will ask that that part, that Mr. Nigro was standing there looking at the car, be stricken. He has been served with a subpoena.

The Court: That may go out. [52]

The Witness: Then I went behind the counter and I looked at the stone, and that was the only time I had my eye off the car.

Q. (By Mr. Hauerken): How far into the store did you go?

A. Actually, I was probably just as close as if I was at the doorway, because the showcase goes right up against the glass.

Q. The question is, How far inside the store did you go? A. From the car?

Q. No, from the front of the store. Were you inside the store one foot or ten feet?

A. Well, I was inside the store—you have to go inside the doorway there, just cut around the corner to get to the showcase. The showcase goes up against the wall.

Q. Were you to the left side of the diagram you have drawn on the board?

A. Yes, left side.

Q. When you were to the left side of the diagram that you drew on the board there, were you able to see your car? A. Yes, I was.

Q. There was a glass there? A. Yes.

(Testimony of Dave Schneider.)

Q. When you examined this diamond for the lady and gentlemen and the people in the store, did you have your back [53] to the light or did you look into the light with the diamond?

A. Well, I was facing the entranceway. They have lights all over the counter, and I was looking into the stone.

Q. I wonder if I might be a little bit more particular about that. You were looking at the stone with a jeweler's glass; is that correct?

A. Yes.

Q. That is a high-powered glass?

A. Yes, sir; 10-power.

Q. You put that up to your eye? A. Yes.

Q. I wonder if you would explain to the court—I'm sure I don't understand—just how you have to have the light play on a stone like that to get the best result for what you are trying to do.

A. You don't have to have your back to it. All you have to have is just a reasonable amount of light in the store.

Q. It can come from any place?

A. It can come from any place.

Q. When you were looking at the stone, were you looking directly out to the street, directly to the left of the diagram, or——

A. No, I was—I guess I was looking kind of a little [54] bit half way.

Q. You were not looking at your ear during that time?

(Testimony of Dave Schneider.)

A. You can't very well look at a stone and look at your car at the same time.

Q. That is obvious. But I would like to have a direct statement in the record that you were not looking at your car while you were looking at the stone. Were you?

A. No, I was not. But then it didn't take very long.

Q. You were examining the stone for what purpose? A. For clarity.

Q. You felt you wanted to do that in a proper manner, didn't you? Not something you would give a lick and a promise, was it?

A. You have to understand, first of all, that those rings particularly were mounted up by our concern, that is, the firm that I own, and had it been anybody else's ring I would have had to spend maybe five minutes or ten minutes looking it over carefully. But I knew the stones pretty well, because I picked them out, and all I wanted to do was to clarify if it had any carbon in it, any black carbon or any white carbon, and it only took me about a minute, maybe less. If you know something, you know it pretty well, it doesn't take you too long to look it over.

Q. If you knew the stone was good and it was one of yours, why did you look at it at all? [55]

A. We mount a lot of stones. There was a possibility, and I wanted to make sure.

Q. The fact that it was your stone didn't mean

(Testimony of Dave Schneider.)

you would give it any less diligent examination than another stone?

A. Well, yes, it would. We don't use any stones with carbon, but once in a while something slips in.

Q. I think you said the glass you used is a 10-power magnifying glass? A. Yes.

Q. That requires some concentration, looking through it?

A. Not particularly; not if you know what you are looking for.

Q. Is it true that you can't concentrate on a car and a diamond at the same time?

A. That is true.

Q. That is so, isn't it? A. Yes.

Q. So for a period of time you were devoting your talents to this stone and not to your car?

A. It was not over a minute. However, I did have a conversation with these people.

Mr. Hauerken: Mr. Ely, page 57, lines 2 and 3.

Q. I asked you, on your examination under oath: [56]

"Q. Would you say for more than a minute?"

And you recall saying, "Could have been two minutes, maybe three"——

A. Yes, but I am sure it was not.

Q. What is your reason now?

A. I said that at the time, but I don't think it could have possibly taken—because I have tried it in the office just to test myself, and it doesn't take me over a minute top.

(Testimony of Dave Schneider.)

Q. You had some discussion about the diamond with the customers, didn't you?

A. Yes, I did.

Q. You invited them down to your place of business, if they would care to come; isn't that so?

A. Yes, on a Sunday.

Q. So it was not only a matter of examining the particular diamond and aiding the California Premium Service in selling some of your merchandise, but also possibly a convenience to these customers in buying some other merchandise from your store?

A. Not some other; some particular type.

Q. But the point I want to get clearly, at the time you were looking at the diamond you didn't have the car in view, did you?

A. I didn't, but Mr. Nigro took it upon himself.

Mr. Hauerken: I move to strike that as being hearsay, [57] your Honor.

The Court: Yes.

The Witness: I want to explain that Mr. Nigro——

The Court: Just answer the question, Mr. Schneider. Your counsel can ask you then.

The Witness: Did you want to ask me that question again?

Mr. Hauerken: I think it is answered all right.

Q. After that, you went up to your car to get your sample cases, didn't you?

A. I talked to Mr. Nigro and I asked him if I could show him something. I told him I had some particular thing I wanted to show him, and I went

(Testimony of Dave Schneider.)

out to the car and opened up the back, and they were gone.

Q. When you went to your car to open up your back, the trunk was locked at the time, wasn't it?

A. Yes, it was.

Q. And the lock hadn't been tampered with, had it?

A. I wouldn't have any way of knowing.

Q. Did it show any signs of forcible entry?

A. It was raining pretty hard, and it wouldn't have any way of showing anything unless you called the Police Department, and they came down from the Sheriff's Department in Lennox and they looked it over and they couldn't get any prints because of the rain. You are talking about forcible [58] entry?

Q. Yes.

A. The lock was not broken, no.

Q. And there was no other sign to you, that you could see with your eyes, of any forcible entry into your car? A. No, sir.

Q. And the trunk was locked when you went to open it? A. Yes.

Q. And when you put the key in and turned the key, you heard the lock open no different than at any other time; isn't that so? A. That's right.

Q. You opened the trunk with the key that you had? A. Yes.

Q. And you heard the lock open, didn't you?

A. Yes, sir. I saw it open. I don't know whether I heard it. I saw it open.

(Testimony of Dave Schneider.)

Q. Do you recall testifying, on your examination under oath, that you heard the lock open?

Mr. Hauerken: Page 59, line 7.

Q. Do you recall testifying to that on your ex-

A. I don't know whether you actually hear any amination under oath?

A. I don't know whether you actually hear any kind of a lock open, especially on a car. You see it open. I guess you see it and hear it. It is the same thing. [59]

Q. All I am asking you now is, Do you recall saying that on March 17, 1955, when I said to you, "And you heard the lock open?"

It is reported here that you said, "Yes."

A. O. K., I will go along with that. Yes.

Q. You don't think now that statement was incorrect, do you?

A. No, I don't because after all, it has been some time.

Q. When you looked in there, the stuff was gone?

A. Yes, sir, the merchandise was gone.

Q. And that meant to you that, somehow or other, the merchandise had been lost out of your car? A. Yes.

Q. And no place else? A. No, sir.

Q. I may have covered this. But so far as you know, no one else had a key to the trunk; is that correct?

A. Not to my knowledge they didn't have.

Q. When you saw that the merchandise was gone from the trunk of your car, you ran into the

(Testimony of Dave Schneider.)

California Premium Service store and told Mr. Nigro that your line had been taken; isn't that so?

A. Well, I told him my line was gone and I would like to use the phone. [60]

Q. And you phoned first the insurance company?

A. No, sir. I first called Bruce's Jewelers.

Q. But did you call the insurance company before you called the police, or did you call the police before you called the insurance company?

A. Well, let's see. I don't remember, but I think I called my office first and I explained to them what happened. But I believe, while I was there, I think Mr. Nigro or someone there by name of Vic did call the Sheriff's Department. I don't remember whether it was simultaneously or whether it was before or a little after.

Mr. Hauerken: I want to ask a few formal questions in connection with the policy, your Honor.

The Court: Certainly.

Mr. Hauerken: There are certain places where merchandise is insured.

Q. Mr. Schneider, this merchandise was not lost from your place at 205 East Broadway, was it?

A. No, sir, it was not.

Q. And it was not lost while it was in first class registered mail in transit, was it? A. No.

Q. Nor was it lost by Railway Express?

A. No, sir.

Q. Nor was it lost by any armored car [61] service? A. No, sir.

(Testimony of Dave Schneider.)

Q. Nor was it lost while it was deposited in a safe or vault of a bank or safety deposit company?

A. No, sir.

Q. Nor was it lost in the company of a dealer in property, a jewelry dealer, a person who is in the jewelry business? A. No, sir.

Q. Nor was it lost while it was in the custody of someone employed by or associated with you?

Mr. Ely: Just a moment. All these questions call for legal conclusions, your Honor.

The Court: He is just asking questions following the policy.

Mr. Ely: I know he is, your Honor, but he is asking him what amounts to legal conclusions. The witness has given the facts. Now he is asking this witness to draw conclusions from those facts, which your Honor can draw better than the witness, in the light of the law.

The Court: I think I will let him answer. It is just following the policy and asking him about those particular situations. The witness has told us how it occurred, but he just wants to ask those questions. He probably has a purpose. Later on he will probably explain to us the reason. I think it is pertinent. I will overrule the objection. [62]

Mr. Hauerken: May I have the question read, please. Mr. Reporter?

(The reporter read the pending question as follows: "Q. Nor was it lost while it was in the custody of someone employed by or associated with you?")

(Testimony of Dave Schneider.)

The Witness: No, sir.

Mr. Hauerken: Now, I want to address a few questions to a clause in the policy which has to do with an inventory, your Honor.

The Court: All right.

Q. (By Mr. Hauerken): Did you have an inventory that morning, December 3, 1954, of the merchandise in your possession and in the cases in the trunk of your car, that you state was lost on December 3rd?

A. I have an inventory all of the time of everything in the place, including what I have in my car and what I have in the salesman's car.

Mr. Hauerken: This will probably shorten it, your Honor. We have this in evidence, but I want to get the matter before the court.

The Court: All right.

Q. (By Mr. Hauerken): At one time you gave a copy of the inventory to the police, immediately after the accident? A. Yes.

Q. And that was not an inventory of the stuff you had, [63] but that was an inventory of what the salesman had? A. Yes.

Q. You gave that to the police so they could see the kind and quality of merchandise, so they could put it on the wire; isn't that right?

A. I didn't give it to them for the quality. I gave it to them for the similarity, because we use the same samples for each line. When we pick out lines

(Testimony of Dave Schneider.)

for salesmen, we pick exactly the same thing right down the line.

Q. That was the inventory in being on December 3, 1954, of merchandise in your car, which you state was lost that day?

A. Well, there actually was a list, but I couldn't find it in the confusion we had between Pinkerton and Mr. Sully, and quite a few of the others were in and out of that office. It was a question—somebody got it, I don't know who did. This particular one, to the best of my knowledge, was as close and accurate as I could give at the time.

Mr. Hauerken: To be sure I understand the answer, I think probably it would clarify the entire matter if I might read to the court the point I want to get over.

The Court: Certainly.

Mr. Hauerken: Appended to the examination under oath—and where this paper was typed up, I do not know, but it was appended to it—an amended statement made by Dave Schneider on April 29, 1955, to the examination under oath of March 17: [64]

"With reference to my statements with reference to inventories of my merchandise, contained on pages 16 to 22, inclusive, of the attached Reporter's Transcript, I stated I could produce a copy of the inventory that I had of the merchandise I took up to Northern California with me in about the month of October, 1954, and which was the last previous long out-of-town trip that I took prior to the loss

(Testimony of Dave Schneider.)

on December 3, 1954, but immediately after this statement was completed at C. E. Knight's office, on March 17, 1955, I went back to my office to get the same so that Mr. Knight could make a photostatic copy, but upon my return to the office I could not find the same nor could any of my employees find the same, even though we made a very diligent search for it, and that it must have been misplaced or lost, and if I should hereafter find it, I will submit it to C. E. Knight or such other person you may designate in Long Beach, California, so that a copy of the same can be made for and delivered to the Centennial Insurance Company.

"In order to clarify the inventories now in the possession of said insurance company, the one that was submitted on or about December 3, 1954, at the time of the loss, and which was for the use of [65] the police and/or said insurance company, is not an accurate inventory of the merchandise I lost on December 3, 1954, and the police and representatives of the insurance company were so informed by me, and was an inventory of the merchandise my salesman had in his two cases which was similar to the line of merchandise in my two cases that I had on the day of the loss, and I believe that said inventory of the salesman's two cases is now in the possession of said insurance company and was given to C. E. Knight at the time of the loss.

"The second inventory referred to is the one attached to my proof of loss made January 20, 1955, which was prepared in connection with said proof

(Testimony of Dave Schneider.)

of loss and shortly before the filing of said proof of loss with said insurance company, and this second inventory is a correct inventory of said loss that occurred on December 3, 1954, and was prepared by checking my books, records, and merchandise.

"All my answers with reference to inventories contained in the Reporter's Transcript hereto attached, are correct, except as they are corrected and modified by the foregoing statement I now make on April 29, 1955."

Q. There was no inventory in being on December 3, 1954, [66] that you ever produced and submitted to the Centennial Insurance Company; isn't that correct?

A. There was one, but, as I said before, I could not find it. However, the way to take a real, true picture of it is to take all the sample lines, which I did, and put them all into stock, and sat down with the girls and the fellows in the office and the shop, and we worked around the clock to get it out for the Police Department and for you.

Q. What I am driving at is that the policy seems to provide that you will maintain a detailed and itemized——

Mr. Hauerken: I don't mean to be arguing with the witness. It is a point I raise in my memorandum. I will let it go at that.

Could we have a few moments recess? I would like to go over my notes, your Honor. I think I am almost finished with the examination of this witness.

(Testimony of Dave Schneider.)

The Court: Certainly. I will be in chambers, and you tell Mr. Fisher when you want me.

Mr. Ely: I understood you had finished, Mr. Hauerken.

Mr. Hauerken: Yes.

The Court: You just wanted to see if you wanted to ask any more questions?

Mr. Hauerken: Yes, your Honor.

The Court: You rest now?

Mr. Hauerken: I have covered it. [67]

The Court: Do you have any more questions, Mr. Ely?

Mr. Ely: Just two or three, your Honor.

Redirect Examination

By Mr. Ely:

Q. Dave, after this catastrophe had occurred, the police came to the store, did they, to the Premium store? A. Yes, sir.

Q. Did you talk to the police?

A. Yes, I did.

Q. Did you recount to the police your activities of that date? A. Yes, sir, I did.

Q. Did you tell them, as nearly as you were able, where you had been, what had transpired, and so forth, as you have told us today?

A. Yes, sir, I did.

Q. You told us that you had been accustomed to leaving your car in a parking lot some half a block from your office—that is, during the time you had owned the car; is that true? A. That is true.

(Testimony of Dave Schneider.)

Q. How long have you owned the car?

A. You mean right now, or prior——

Q. No, up until that date. [68]

A. About six months.

Q. About six months. And would you say, generally, that most every day you would park your car and leave it in the parking lot?

A. Yes, sir, I would.

Q. And was it true that this was a parking lot where you had to leave your car—I mean, had to leave your key with the car, so that if the parking lot attendant had to move it, he could move it?

A. That is right.

Q. Do you know of your own knowledge whether or not, during that six months up until the day of this calamity, any duplicate had been made by anybody of this key?

A. I don't know of any, but it is possible.

Q. Well, of your own knowledge, then, your answer would be that you don't know whether it had been or whether it had not been; is that true?

A. Yes, sir.

Q. I am interested especially in this trip that you made of this four miles up until the time you got to this Premium store from the last place. What had been the last place—Joy's?

A. Joy Jewelry, yes, sir.

Q. Your impression was that you were about four miles in slow traffic? [69] A. Yes, sir.

Q. How congested was that traffic during that trip?

(Testimony of Dave Schneider.)

A. I would say we were stopped at times from three to five minutes at a time, several stops.

Q. You mean where there was no stoplight?

A. That is right; in the middle of the block where there was congested traffic.

Q. Was that because of cars stopped ahead of you?

A. Because of cars stopped ahead of me, and cars going through intersections, and I was in the middle of the block and the cars up ahead were stopped.

Q. Was it raining at that time during that trip?

A. Yes, sir, it was raining.

Q. Did you have to stop at any time during that trip for traffic?

A. Yes, there was traffic lights ahead, and I stopped there, too. However, I stopped more in the middle of the block than I did at any other place.

Q. Do you feel that at times you stopped from three to five minutes in this congested traffic?

A. Yes, because, as I stated before, it took me quite a long time to get over there, and it is really a short distance.

Q. Had you been active in any way in jewelry associations? What I want to find out, according to the legal rules [70] of evidence, is whether or not you are well known in jewelry circles?

A. Yes, I think I am.

Q. How long have you been calling on customers, leaving your place of business in Long Beach, taking your sample cases to your car, with dia-

(Testimony of Dave Schneider.)

monds and jewels, and calling on customers in Los Angeles County?

A. Well, in my own place of business, ten years; but all together about twenty-two years.

Q. For twenty-two years you have been engaged in the jewelry business in this community; is that correct? A. That is correct.

Q. Your own place of business in Long Beach for ten years; has that been in the same location?

A. Yes, sir, the same location.

Q. Do people come to your office there?

A. Yes, sir, they do.

Q. I want to be sure I cover this. Do you know whether or not the key that was ordinarily used and employed to open the trunk, when you left it with the car, was ever taken away from your car while it was in the parking lot near your office and a duplicate key made?

A. Not to my knowledge.

Q. You don't know one way or the other?

A. I wouldn't have any way of knowing. [71]

Q. Do you know whether there was ever any kind of duplicate key made by anybody prior to the time of this calamity merely from the keyhole itself in the trunk?

A. I have no way of knowing.

Q. You don't know whether there was or whether there was not? A. No, I don't.

Q. You were asked two or three times by counsel as to whether or not you had any explanation as to the manner in which this loss occurred?

(Testimony of Dave Schneider.)

A. Well, I have a general idea.

Q. Will you tell us? A. Surely.

Mr. Hauerken: If your Honor please, I think this question is objectionable.

Mr. Ely: I will withdraw it and ask it in this way.

The Court: All right.

Q. (By Mr. Ely): You were questioned about your statement you made under oath in connection with this claim. The statement has been introduced in evidence, and it shows that there were present Mr. George Hauerken and Mr. Hengel—Mr. Hauerken representing the Centennial Insurance Company, Mr. Hengel representing you—Mr. Homer Duke, Mr. James J. Walsh, Mr. Frank R. Dumont, and C. E. Knight. Who are those last people? [72]

A. Mr. Knight is the gentleman sitting over there; he is with the adjusters.

Mr. Duke is my accountant.

Mr. Hengel was my counsel at the time.

Mr. Hauerken—that is this gentleman over here, the attorney.

The other people there, I think, were in connection with the insurance company.

Q. I think they identified themselves. Mr. Walsh, claims manager for the Pacific Division of the Centennial Insurance Company, was there; Mr. Frank R. Dumont, Los Angeles claims representative for the Centennial Insurance Company; Mr. C. E. Knight, an independent adjuster. Do you remember that those gentlemen identified themselves

(Testimony of Dave Schneider.)

at the time of this statement? A. Yes, sir.

Q. In other words, as I understand the sequence of events that counsel inquired about, you filed the proof of loss we have identified here as our Exhibit 2? A. Yes.

Q. Then the company sent you a legal-looking notice that they were going to examine you under oath; is that right? A. Yes.

Q. Then you employed a lawyer?

A. Yes. [73]

Q. When you showed up at the time, there was Mr. Hauerken and these three or four insurance people there? A. Yes.

Q. And the reporter? A. Yes.

Q. But you had made arrangements to show up with your own lawyer at that time?

A. That is right.

Q. Mr. Hauerken asked you a moment ago about some of your testimony in here, and he read this question——

Mr. Ely: On page 66, counsel, the last line.

Q. (Continuing): ——with respect to this loss you sustained:

"Q. It is unexplainable to you, then?"

And you answered, "To me it is unexplainable."

Then you started to say that you had an explanation now that you did not have then, and counsel said I could bring that out when it came my turn. I would like you to turn around and——

Mr. Hauerken: Just a moment.

Mr. Ely: Let me finish the question, please.

(Testimony of Dave Schneider.)

Mr. Hauerken: Certainly.

Q. (By Mr. Ely): I would like you to turn around and tell Judge Clarke what your explanation was that you wanted to make in amendment to this answer, that you didn't make a [74] while ago.

Mr. Hauerken: I would like to suggest to the court that I suggested that it was something Mr. Ely might ask his witness when the time came. I didn't mean to imply that I would consent and that I would not object to the question when propounded.

It would seem to me that, at this late date—December 3, 1954, this occurrence; March 17, 1955, the examination under oath—March 26, 1956, I think that the gentleman now would be making a conclusion as to what it was.

The Court: Well, I will let him answer, and if it gets to be a conclusion I will have to grant a motion to strike. I will let him answer.

Mr. Ely: The only thing, Judge, this is not a deposition.

The Court: I know. I am going to let him answer now, and we will see.

You may answer.

The Witness: Well, in my opinion—of course, this is my opinion—the only place it could have happened is at a time when I left Joy Jewelry until I got to California Premium, while the time I was stopped in between. Prior to that, I would definitely say I had the car in full view all the time. I don't know how it could have happened any other place.

(Testimony of Dave Schneider.)

Mr. Hauerken: At this time, I move to strike the answer [75] as being purely an opinion and a conclusion of the witness, your Honor.

The Court: I think it is. I will grant the motion to strike. I have his explanation of it, but it is his opinion and conclusion. I will let it go out.

Mr. Ely: Now, I want to move to strike his evidence, your Honor, in this proof of loss, where counsel himself asked for the same opinion as to whether or not it was explainable. Counsel's theory seems to be that he may ask questions in a proof of loss, in a sworn statement, where the man didn't even have a lawyer, apparently, when they served the notice on him—I don't know—but they ask questions as to whether or not the loss is explainable, and then they adopt the part they like and want to reject the part they don't like.

But I think, since the court has—well, I will withdraw the motion to strike. It is a question of argument.

The Court: All right, the motion is withdrawn.

Q. (By Mr. Ely): You were questioned concerning some of the fine printing, the same being, I believe, paragraph 8, Section (A), about the maintenance of a detailed and itemized inventory in such manner that the amount of the loss could be accurately determined by the company.

I want to ask you, whether you call it an inventory or books of account or invoices, or whatever name you may give [76] to it, whether or not you maintain in your office records from which an ac-

(Testimony of Dave Schneider.)

curate evaluation of the loss you sustained could be ascertained by you or the Centennial Insurance Company, or any bookkeeper or accountant who wanted to look at it. A. I definitely——

Mr. Hauerken: Just a moment.

Mr. Ely: Just a second.

The Witness: I definitely do.

Mr. Ely: Excuse me, Dave. Have you been in court before?

The Witness: No, sir, I haven't.

Mr. Ely. Well, just wait a minute. When this gentleman gets up, that means he wants to object.

The Witness: I'm sorry.

The Court: What was your objection, Mr. Hauerken?

Mr. Hauerken: I object to the question on several grounds, your Honor. The principal objection that I have is that counsel tries to read into the policy an inventory or any other books or things of that nature of an inventory. These cases—I mean, this is not a nice thing to say. I firmly believe, in my own opinion, that something happened to this man that was very bad. But the fact remains that that doesn't necessarily say that what occurred to him, or what he said here, is covered under the policy. We can't remake [77] the policy.

There is one case that we cited in this memorandum we had. The court went to some length to say that it is not up to anyone at a later date to try to make a policy and make that covered which was not covered at the time the policy was issued.

(Testimony of Dave Schneider.)

This is a sticky kind of an insurance, your Honor: High values, easily stolen. Contentions could be made which may or may not be proper, and that is the reason for these qualifying clauses in this particular type of policy.

The policy says that the assured will maintain a detailed and itemized inventory of his or their property. That is what the policy says.

There are any number of cases that hold—and they are called the "iron safe" clauses, usually found in fire insurance policies, where the contents of a building are insured, and they require and the reason that they get that name is that these inventories shall be kept in an iron safe so that they will not be destroyed in the conflagration in which the merchandise is destroyed—the cases say that the reason for that clause is so that the insurance company, after the loss, can have a readily identifiable means of determining the nature and extent of the loss and can check back into other sources from such an inventory to determine whether or not the loss was genuine. And while it is hard law, in [78] connection with these "iron safe" clauses—I will admit that—yet it is necessary for the protection of the insurer that this be done. Otherwise, the insurer can be imposed upon.

So counsel has added words to his question and he says "an itemized inventory or some other records from which the insurance company could have discovered," which brings us to our second vice, and that is that this man is now to make a conclu-

(Testimony of Dave Schneider.)

sion as to what the insurance company might have discovered by looking at some other records he might have had.

That is the basis of my objection. I think it is a sound one, your Honor.

Mr. Ely: May I be heard, your Honor.

The Court: I will overrule the objection. He may answer.

You may answer.

The Witness: Ask me the question again, please.

Mr. Ely: I will withdraw it and put it very simply.

Q. It is simply this: Whether you actually designate whatever list you had in your establishment as an inventory or whatever you call it—names, I claim, are not important—did you have data there from which the amount of your loss and what you lost could be ascertained?

Mr. Hauerken: May I note the same objection, your Honor? [79]

The Court: Yes. It is overruled.

Q. (By Mr. Ely): Did you have it?

A. Yes.

Q. And did you show it to the representatives of the company? A. They sent a man over.

Q. Do you remember his name?

A. No. sir. It was a gentleman they sent over to check my file.

Q. To check your books? A. Yes.

Q. Finally, when you walked around here (indicating on diagram), to—I gather, a courtesy to

(Testimony of Dave Schneider.)

this lady or somebody who was here—wasn't there a lady for whom you looked at that diamond?

A. Yes.

Q. Subpoenaed by the defendant, I believe?

A. Yes.

Mr. Ely: I don't see her. Perhaps she has gone.

Q. In any event, when you walked around to look at that diamond for that lady, and Mr. Nigro told you he would watch the car——

Mr. Hauerken: Just a moment. I object to that, your Honor.

Mr. Ely: Excuse me. [80]

Q. Mr. Nigro said something to you. I was not quite clear what you meant when you told his Honor you didn't get any further away from the automobile than you were from the point where you were talking to Mr. Nigro.

A. Well, actually, I would be closer, because——

Q. Can you take a piece of chalk and explain that? A. Well, I can somewhat.

Q. Don't draw on it, but just use it as a pointer and show Judge Clarke where you went.

A. Well, this is the entrance right here, and I went this way. Over here there is a wall case, and then there is a counter right over here. I went behind here. Actually, I would be much closer than I was over here, because I was just the thickness of a glass, which is all there is there.

Q. This is your car (indicating)? A. Yes.

Q. Here is where you were with Mr. Nigro looking at the car; is that right? A. Yes.

(Testimony of Dave Schneider.)

Q. Then, when you walked over to look at the diamond, the further over you got behind the counter, since there was only the glass between you and the car, you were closer to the car than you were at the doorway; is that generally the fact?

A. Yes. [81].

Q. This statement here, dated December 3, 1954, typewritten statement that has been offered by counsel in evidence here, that is dated the very date of this loss; is that right. A. Yes.

Q. Did you have counsel at the time you gave that statement? A. No, sir; I didn't.

Q. Who typed that up?

A. I think it was Mr. Knight and one other gentleman that was with him.

Q. Is Mr. Knight here today?

A. Yes, sir; he is the gentleman sitting down there.

Q. You say you did or did not have a lawyer?

A. No, I didn't have counsel with me.

Q. You told them the best you could about the facts?

A. To the best of my ability, yes, sir.

Mr. Ely: That is all, your Honor.

The Court: Any questions, Mr. Hauerken?

Mr. Hauerken: Yes, your Honor.

(Testimony of Dave Schneider.)

Recross-Examination

By Mr. Hauerken:

Q. Mr. Schneider, you did periodically make an inventory of the merchandise that you carried in your sample cases; [82] is that not so?

A. That is so, but I also have an actual inventory at all times.

Q. You said something about going up to Northern California on a sales trip and making an inventory and that was your basic inventory of the stuff that you had in your cases? A. Yes, sir.

Q. That inventory is the one you said you would produce on your examination under oath but were unable to find at a later date; is that not so?

A. That is so.

Q. And that inventory, you never have been able to find from the date of the occurrence until today?

A. No, I haven't been able to find it, but it is through no fault of my own. We had quite a lot of confusion out there. I don't know whether somebody did get hold of it, whether it could have been Pinkerton or somebody else. There was a lot of people coming in and out all the time.

Q. You mean somebody might have stolen it?

A. Well, they might have taken it. I don't say "stolen it."

The Court: He used the word "taken."

Mr. Hauerken: That is all, your Honor.

The Court: That is all? [83]

Mr. Ely: That is all.

Mr. Stelzer.

ADOLPH DAVID STELZER

called as a witness on behalf of the plaintiff, being first duly sworn, on his oath testified as follows:

The Clerk: State your full name, please.

The Witness: Adolph David Stelzer.

Direct Examination

By Mr. Ely:

Q. Mr. Stelzer, do your recall an occasion on or about December 3, 1954, when my client came to your place of business? A. Yes.

Q. I am speaking of an occasion when you took him to show him your car that you bought for your wife. A. Yes, I remember that.

Q. When he first came there, did he come to your doorway? A. Yes.

Q. Did he ever come any further into your place of business than the doorway?

A. That is right.

Q. Can you tell the judge whether or not at that time his automobile was in the plain sight of you at the time? [84] A. Yes.

Q. And when you went around to the back and parked—did you do that? A. Yes.

Q. In his car? A. Yes.

Q. And then you got out and looked at the car you purchased for your wife? A. Yes.

Q. Can you sort of describe for Judge Clarke here, by indicating in the courtroom, about the area of space you were confined in back there?

(Testimony of Adolph David Stelzer.)

A. Well, I would say the greatest amount of space at that particular time between the two automobiles—where the two cars were parked there was approximately the space of the jury section, approximately.

Q. Was the car in your sight all of the time?

A. Yes.

Q. Was there any particular reason that you were observing the car?

A. Well, I observed the car because I knew Mr. Schneider was parked really against the law, across the sidewalk. I think he was extending out over the sidewalk and very close to the red zone which starts right at the end of the sidewalk and down. [85]

Q. Were you watching for the officers or something?

A. Well, I feel that he could have been——

Q. Is that the reason you were looking?

A. Well, that was one reason.

Q. But, in any event, can you tell his Honor, for whatever reason, that you were watching his car?

A. Well, I would say that I saw his car and I was in the close vicinity of his car at all times. I don't say that I was watching it as if I thought someone was going to steal something out of it.

Q. How much time, over all, were you folks there while he looked at your car?

A. Well, I think it was close to five or six minutes rather than what was stated. Of course, that was my opinion, and that was a year and a

(Testimony of Adolph David Stelzer.)

half ago, remember, and I haven't thought much of it since.

Q. The fact that my client stated "ten or fifteen minutes" must not influence you.

A. Then I would say not more than five, six, or seven minutes.

Q. Were you in such an area that you feel, if anyone had come there, you would have seen them, aside from you and—— A. Yes, I think so.

Q. Did you see anybody? [86]

A. No, sir.

Q. Did you hear them? A. No, sir.

Q. Nothing of an unusual nature?

A. No, sir.

Mr. Ely: That is all. You may cross-examine.

Cross-Examination

By Mr. Hauerken:

Q. Mr. Stelzer, there is a red zone on Nutwood Street? A. Yes.

Q. Would you go to the board and the diagram Mr. Schneider drew, and point out to his Honor the red zone there is to be found on Nutwood Street in the alley?

A. There are two red zones, sir. This alleyway here, there is room for cars to park, and an open alleyway that goes back this distance, which is a closed alley. There is a red right in here——

Q. Mark that "S-1," will you, please?

(Testimony of Adolph David Stelzer.)

A. "S-1" (marking diagram), and there is a red zone marked here, like that (indicating).

Q. Mark that "S-2."

A. "S-2" (marking diagram).

Q. I am going to show you the statement. You may sit down, Mr. Stelzer. [87]

(The witness resumes the stand.)

(Mr. Hauerken shows document to Mr. Ely.)

Q. (By Mr. Hauerken): Before I do, when you drove around to the back in the alley in Mr. Schneider's car and he parked his car, you got out of Mr. Schneider's car, I take it?

A. Yes, sir.

Q. Did you walk over to your car?

A. Yes, sir.

Q. Did you get in your car?

A. I don't remember. I am not positive whether I got in it. I think I did, but I am not positive.

Q. Did you demonstrate or exhibit to Mr. Schneider this fancy instrument board on this new car?

A. Well, I told him to look at it, that I did. I told him to examine it. I didn't make a big deal out of it.

Q. You went around to look at it. You were proud of your new car?

A. Oh, yes, yes; the exterior more than the interior.

Q. We all are. Did Mr. Schneider get into your new car? A. Yes.

(Testimony of Adolph David Stelzer.)

Q. He did? A. Yes.

Q. You are sure of that? [88]

A. Well, I think so, yes, sir.

Q. Where did Mr. Schneider park his car with relation to the red zones, now?

A. Well, there seems to be a little complication about that, but if I remember right, from a year and a half from this present time, my understanding or what I am thinking about what happened a year and a half ago was that he came around the corner, came down in through here (indicating). Now, this was a rainy day and there wasn't any traffic much on Nutwood at all. There were no pedestrians around there. And we cut across this red. It was more like this, at an angle, rather than it was one car backed right back of the other. My idea of it was not like anyone else's.

Q. Would you say that that car is parked in a red zone, the way you have drawn it there, or would you say it is parked smack back in the middle of an alley?

A. Well, this sidewalk is just about one-fourth, I would say, or one-third of the entire length of the Cadillac, and I would say one-third of it was over the sidewalk, I would say partially maybe over the red and partially into the alley, and I think that long Cadillac can go into all those directions. Of course, that is getting rather technical.

Q. Am I to understand that the curbing in the alley was marked red, or the curbing on——

A. No, here, as I marked "S-1" and "S-2." [89]

(Testimony of Adolph David Stelzer.)

Q. Well, I want to get this very clear.

A. Yes.

Q. The curbing on Nutwood is red at the corner; is that right or is that wrong?

A. I don't know what you are asking me.

Q. Describe to me again, if you will, what curbing was marked red in the vicinity of the alley.

A. This is the only thing that is marked red, right in here (indicating).

Q. While you are there, you are marking the curbing that defines Nutwood Street but not defining the alley; isn't that correct?

A. It is all in Nutwood. It is not in the alley, no. The red is not in the alley at all.

Q. The red marking on the curb is on Nutwood?

A. That is right, sir.

Mr. Hauerken: May I approach the witness, your Honor?

The Court: Certainly.

Q. (By Mr. Hauerken): May I ask you a question or two?

The lower side of his diagram, is that built up, right up to the street line, or are there sidewalks?

A. This building goes right back to the parking. That is where we park our cars, in there.

Q. On the upper side of the alley, here, is there a building there or is that—— [90]

A. No; there is a wall.

Q. A wall? A. Yes.

Q. How high a wall? A. Oh, three feet.

(Testimony of Adolph David Stelzer.)

Q. Is that right over the line with the property? A. Yes.

Q. Am I to understand that Mr. Schneider parked his car right in the center of the alley?

A. At an angle, is as clear as I can think.

Q. I have shown you this before? A. Yes.

Q. Here is a statement which bears date of December 7, 1954, two pages. Does that bear your signature? A. Yes.

Q. The first page bears your initial?

A. Yes. I haven't read——

Q. Would you like to read it (handing document to the witness)?

A. Yes, sir; that is mine.

The Court: Do you want to make it an exhibit?

Mr. Hauerken: Yes, I do, your Honor. I would like to mark this as defendant's exhibit next in order.

The Clerk: Defendant's Exhibit C.

The Court: Defendant's C. [91]

(The document referred to, marked Defendant's Exhibit C, was received in evidence.)

Q. (By Mr. Hauerken): In the light of the diagram on the board there, I would like to ask you about this part of your statement:

"I talked to Dave about business for a minute or possibly 5 minutes, standing at the front door, and then asked him to go around to the rear of my store to look at my new 1955 Ford Crown Victoria. He refused to leave his car and we therefore rode around the block to the rear of my store, in his

(Testimony of Adolph David Stelzer.)

Cadillac, parking it in a red zone on Nutwood St. * * *"

Now, you haven't drawn that in a red zone on Nutwood Street, have you?

A. Sir, my understanding is that any time you park in an alleyway, that is a "no standing place. Therefore, I call it a "no parking" zone, probably should have been the words. But I was not under oath. I was just trying to help, and I didn't get technical about it.

Q. Well, I don't understand——

A. It is a no-parking zone in an alleyway.

Q. ——that you don't have to be careful if you are not under oath? A. At that time I was not.

Q. But you said "parking it in a red zone." That is [92] pretty particular language; isn't that so? A. It's what kind of language?

Q. I say that is pretty particular language, "parking it in a red zone." Do you mean to suggest to the court——

A. In a "no parking" zone probably would have been the better language.

Q. Let me finish, please. A. Yes.

Q. Do you mean to suggest to Judge Clarke that the way you have drawn that oblong there, indicating Mr. Schneider's car in the middle of the alley, that it is parked in a red zone?

A. That is a red zone or a "no parking" zone, I should have said, probably.

Q. As a matter of fact, he had his car parked around the corner at the time; isn't that so?

(Testimony of Adolph David Stelzer.)

A. No, sir.

Q. And this statement made four days after this occurrence and before any litigation——

A. Yes.

Q. ——is then incorrect?

A. The statement?

Q. That part of it? A. Yes, it was correct.

Q. That is incorrect? [93]

Q. No, it was correct.

Q. But you interpret it——

A. Let me get the question again. You confuse me. What was the question before, that I said was correct? I would like to hear that again.

Mr. Hauerken: Suppose we have the reporter read it. I don't want to confuse you, Mr. Stelzer.

(Whereupon, the reporter read the record as follows):

"Q. As a matter of fact, he had his car parked around the corner at the time; isn't that so?

"A. No, sir.

"Q. And this statement made four days after this occurrence and before any litigation——

"A. Yes.

"Q. ——is then incorrect?

"A. The statement?

"Q. That part of it?

"A. Yes, it was correct.

"Q. That is incorrect?

"A. No, it was correct.

"Q. But you interpret it——

(Testimony of Adolph David Stelzer.)

"A. Let me get the question again. You confuse me. What was the question before, that I said was correct? I would like to hear that again."

The Witness: You asked me if the car was parked around [94] the corner. That is the confusing part. What corner are you talking about?

Q. (By Mr. Hauerken): Well, either corner, either the upper corner on the diagram or——

A. What was the question you asked me?

Q. Well, Mr. Stelzer——

A. Well, if he was around the corner—I drew it as close as I can.

Mr. Hauerken: Let me clarify this. I think I can.

The Witness: All right.

Q. (By Mr. Hauerken): I read a writing that says a Cadillac automobile was parked in a red zone. Then I ask a person who made that statement to draw these red zones. He draws one to the north of the alley, this upper being the north. He draws one to the south of the alley. At the same time he draws a car in the middle of the alley.

A. Also, this is drawn in through like this. You see, that is red also (indicating).

Q. I understood you to say there were no red curbs in the alley.

A. That is not in the alley, sir. That is out in the street.

Q. I understood you to say that only Nutwood Street was defined with red markings?

(Testimony of Adolph David Stelzer.)

A. That is right. [95]

Q. Then that is not a red mark defining the alley?

A. This is not the alley. This is in the street. That is a triangle thing to keep them from parking there.

Q. In the statement made four days after the accident, you said, "We both got out of his car and stood about 15 feet in front of this Cadillac and looked at my Ford. The weather was rainy and there were very few, if any, pedestrians nearby." That is not entirely clear to me, in the light of what you just said about whether you got into Mr. Schneider's car or didn't or whether Mr. Schneider got into your car——

Mr. Hauerken: I will withdraw that.

Q. I understood you to say a few moments ago, on testimony here, that you don't recall whether you got into your own car back there; you think you did? A. I don't remember.

Q. That is what you said; isn't that so?

A. I said I don't think I remember exactly whether I did or whether I didn't. I am not positive, so I don't want to go on saying something I am not positive of.

Q. I understood you to say before, in this courtroom, that Mr. Schneider did get into your car.

A. I think Mr. Schneider did.

Q. Well, are we to understand from this statement that "We both got out of his car and stood about 15 feet in front of his Cadillac"—am I to

(Testimony of Adolph David Stelzer.)

understand that you mean Mr. [96] Schneider got into your car but you didn't?

Mr. Ely: I object to that, your Honor.

Mr. Hauerken: Well, I will let it go.

The Court: I will sustain it.

Mr. Hauerken: I think it is probably argumentative. I'm sorry.

That is all the questions I have of this witness.

The Court: Is that all?

Mr. Ely: Just one question, your Honor.

Redirect Examination

By Mr. Ely:

Q. I am not sure counsel meant to imply—is this statement in your handwriting?

A. No, sir.

Mr. Ely: I believe counsel said, as I understood——

The Court: Well, he just signed it, didn't he?

Mr. Ely: I imagine so.

Q. Was this an insurance adjuster who came out and took this?

A. I don't know. I had three or four of them come out there. I don't know which one was which.

Q. Did you have a copy of this?

A. No, sir.

Q. Whoever took it didn't leave you a copy of it? [97] A. No, sir.

Q. Are you trying to tell the court the best you can about this? A. Yes, sir; to be honest, I am.

Q. Did you talk to the police officers about this event?

(Testimony of Adolph David Stelzer.)

A. There were two or three men that came out there. I don't know which ones were police and which ones were anything.

Q. Some were?

A. They presented some credentials, I am sure. Otherwise I wouldn't have spoken to them.

Mr. Ely: That is all.

The Court: Is that all?

Mr. Hauerken: No further questions, your Honor.

The Court: Do you have another witness?

Mr. Ely: One more, your Honor.

The Court: All right.

Mr. Ely: Mr. Nigro, please.

GEORGE W. NIGRO

called as a witness on behalf of the plaintiff, being first duly sworn, on his oath testified as follows:

The Clerk: State your name, please.

The Witness: George W. Nigro. [98]

Direct Examination

By Mr. Ely:

Q. You are the proprietor of the California Premium Company? A. Yes, sir.

Q. And you have been here in court today?

A. Yes.

Q. Do you recall the incident that we have been going over here, about an occasion when Mr. Schneider, my client, lost some merchandise?

(Testimony of George W. Nigro.)

A. Yes?

Q. Do you remember whether or not he came to the front of your store on that day?

A. Yes, sir.

Q. Did you have a conversation with him?

A. Yes, I did.

Q. At the time of this conversation at the doorway of your place, was his automobile in your sight, in your view?

A. It was in our view when we were talking about——

Q. You can't say that.

Mr. Hauerken: I move that that go out.

Mr. Ely: I will stipulate that it go out.

The Court: It may go out.

Q. (By Mr. Ely): Was it in your view?

A. Not in mine. [99]

Q. Were there some people in your store looking at some diamonds or something, some merchandise?

A. Yes, there was.

Q. Was this lady who was here under subpoena by the defendant—was she one of them?

A. Yes, it was her.

Q. Did you have some conversation with my client with respect to the examination or his looking at a diamond?

A. Yes. Well, one of the clerks, that was waiting on this lady——

Q. I can't permit you to go ahead, because you may say some conversation. I am trying to avoid it.

(Testimony of George W. Nigro.)

All I want you to do is to answer yes or no to this question:

Did you have a conversation with my client concerning his examination of a diamond?

A. Yes.

Q. After that conversation was had, can you tell the court whether or not my client examined the diamond? A. Yes.

Q. Can you tell the court what you were doing while my client was looking at this diamond?

A. Yes, I can.

Q. What were you doing?

A. I was looking at his car.

Q. At his car. Can you tell us whether or not, during [100] the time that my client was at your place of business, anybody went into the back end of his car from the time he left to look at the diamond until he went back to the car?

A. Yes, I can.

Q. Was there anybody?

A. No, there couldn't.

Mr. Ely: That is all.

Mr. Hauerken: I didn't hear that.

The Court: He said, "No, they couldn't."

Mr. Hauerken: I didn't hear the question.

Mr. Ely: I asked him whether anybody went to the back end or the trunk of the car while my client was examining the diamond.

The Court: His answer was, "No, there couldn't."

(Testimony of George W. Nigro.)

Cross-Examination

By Mr. Hauerken:

Q. Did you have a pretty heavy load of customers that day there?

A. Yes, there was a few in there at the time.

Q. You purported to be watching Mr. Schneider's car the whole time, did you?

A. I was watching it only when I turned around, because when we were talking I had my back to the car, and he was watching his car. Then, when I asked him to examine the [101] diamond for the lady, he said, "Well, will you watch my car?" So I turned around and I went over by the door and was watching the car.

Q. Do you remember, on December 7, 1954, somebody coming out to see you and getting a written statement from you?

A. I don't remember days, but I know either the next day or the same day somebody did come out.

Q. Do you remember somebody from the insurance company coming there and talking to you about it, investigating the loss?

A. I know they were there the same night. I think it was that night.

Q. Did you tell them this specific thing: that while one man turns his back, the other turns around automatically and watches the car?

A. I am pretty sure somebody took that down. I told it to somebody.

(Testimony of George W. Nigro.)

Q. Did you tell the insurance agent pretty much what you saw about the situation there?

A. Yes, I told them, pretty much.

Q. Do you think you pretty well stated, in the statement you gave them, what you did see and what you didn't see? A. Yes, I did.

The Court: You may show him the statement, to save time. Mr. Ely will probably stipulate to the signature. [102]

Mr. Ely: Let him go ahead with it, subject to a motion to strike. I have never seen it.

Mr. Hauerken: I want to show it to counsel first.

Mr. Ely: You don't have to.

This is a businessman, subpoenaed by them and not by me, and I want to get him away.

The Court: All right.

(Mr. Hauerken hands a document to the witness.)

The Court: Is that your signature at the end there?

The Witness: Yes, that is my initials there.

Q. (By Mr. Hauerken): Would you read it?

A. Yes.

The Court: It will take a little time. Why don't you put it in evidence?

Mr. Hauerken: I will offer in evidence this as defendant's exhibit next in order, your Honor.

The Court: All right.

The Clerk: Defendant's Exhibit D.

(Testimony of George W. Nigro.)

(The document referred to, marked Defendant's Exhibit D, was received in evidence.)

Q. (By Mr. Hauerken): This statement dated December 7, 1954, you signed that, didn't you?

A. I didn't look at the back. I know I initialed it there. If it is on there, I probably signed it.

The Court: He wants to look at the back. [103]

Q. (By Mr. Hauerken): Does that bear your signature? A. Yes.

Q. And the pages bear your initials?

A. Yes.

Q. And is this a pretty full statement of what you told the insurance man?

A. Yes, because I told him and the police.

Mr. Hauerken: That is all.

Mr. Ely: That is all.

The Court: The witness may be excused, then?

Mr. Hauerken: Yes.

The Court: He wants to go back.

Mr. Ely: One question, your Honor.

Redirect Examination

By Mr. Ely:

Q. Did you also talk to the police about it?

A. Yes.

Q. Gave them a statement? A. Yes.

Mr. Ely: That is all.

The plaintiff rests, your Honor.

The Court: The witness is excused and doesn't need to return tomorrow.

Mr. Ely: The plaintiff rests. [104]

Mr. Hauerken: The defense rests, your Honor.

Mr. Ely: May we argue in the morning, Judge?

The Court: Certainly.

Is that all right with you?

Mr. Hauerken: May I suggest this? This is a technical case. I always have the feeling that a lawyer can do a better job in writing than he can oraliy. If your Honor would prefer oral argument in the morning, I am prepared to do it.

Mr. Ely: I would like to argue.

The Court: Mr. Ely says he would like to argue.

Were you planning to take the train back tonight?

Mr. Hauerken: No, I will be here in the morning.

The Court: Well, then, we will meet at 10:00 o'clock. If we need anything more, we can do it in writing.

Mr. Hauerken: Your pleasure, Judge. Ten o'clock?

The Court: Yes.

How long do you gentlemen want?

Mr. Ely said he wanted to get through at noon.

Mr. Ely: As a matter of fact, I will probably waive opening. Mr. Hauerken has raised a bunch of defenses which your Honor will probably acquaint himself with tonight, if you are not already acquainted with them, and that will save some time. It depends on the length of Mr. Hauerken's argument. I think I could cover mine in 45 minutes.

Mr. Hauerken: May I suggest, I would appreciate it if [105] your Honor would analyze the evidence in this case in the light of the cases that have been cited.

The Court: I will do that.

Mr. Hauerken: I would appreciate it if, instead of oral argument tomorrow, we could have a copy of the transcript made today, so your Honor can have a copy of it. I think your Honor should have the benefit of that examination under oath, those written statements. There is much there I think your Honor should have in mind factually, so that when we do discuss these matters from a legal standpoint I think probably it would be easier for the court to arrive at a better solution. I don't mean for tomorrow morning. I mean in lieu of an oral argument.

The Court: Well, Mr. Ely says he wants to make an oral argument. I have to be courteous.

Mr. Hauerken: Well, he waived his opening.

The Court: Well, I will say this. We will have oral argument in the morning, but I think you should make an opening argument.

Mr. Hauerken: I think he should.

The Court: Inasmuch as oral argument is at your request, you should make an opening argument. How long it is, is up to you.

Mr. Ely: All right. It will take me 30 minutes to open and possibly 15 minutes to close. [106]

The Court: Do you think we ought to start at a quarter of ten?

Mr. Hauerken: All right, any time.

The Court: Mr. Ely said he wanted to finish by noon.

Mr. Ely: I will finish, unless counsel takes a lot of time.

The Court: Maybe we better start about a quarter of ten.

Mr. Ely: Fine, your Honor.

The Court: Is that satisfactory?

Mr. Hauerken: That is satisfactory, your Honor.

The Court: We will run in the afternoon if we don't get through, except Mr. Ely said he would like to get through.

Mr. Ely: I would like to.

The Court: If we have to run in the afternoon, I am at your service. I will run in the afternoon if I have to. We will meet that problem tomorrow.

(Whereupon, the taking of testimony in the above-entitled case was concluded.) [107]

Tuesday, March 27, 1956, 9:45 A.M.

Plaintiff's Opening Argument

The Court: Mr. Ely.

Mr. Ely: May it please the Court and Counsel.

I appreciate the Court's courtesy in extending this opportunity to me to present to your Honor my client's position. I really can hardly profess to be insensible to my position at any time when I arise to address a court without a jury on matters of law, feeling always that the court, by reason of its experience, its position, its access to research per-

haps, is in a better position than the ordinary lawyer to resolve the conflicts of law, if any, and arrive at a just determination of the merits of any cause. But every time I begin to think that way and I think perhaps I shouldn't debate the issues with the court, I go back to over twenty years ago when I came out of law school. My father had just retired from the Bench, and in talking to him I asked him, "Dad, when you are trying a case without a jury, do you think it hurts or helps a lawyer and his cause to discuss the matter with the court?" He said, "Well, son, as far as I am concerned, I feel while many times I have not gained anything from argument, nevertheless I like to hear the lawyer's viewpoint and I feel that in many instances I have been helped."

I think that is the attitude that your Honor has. So I am going to try to present my view of this case to your [110] Honor. It is not easy, because of the six, at least four defenses raised which I must try to discuss in the light of more or less technical provisions of the policy within a few minutes, and I think I will be sustained by the apparent justice and right of my position and I believe I can make your Honor see it. Because of the courtesty extended in this court, I feel fortunate that I can approach the issues in an attitude of rather calm detachment.

This is not an earth-shaking lawsuit. The world will not stop turning, whichever way the decision is. My client will, as he has for many years, continue in business honorably, I am sure, and will

get along. Twenty-six thousand dollars is a lot of money, but I feel sure if your Honor feels that he is not right and holds for the defendant here, he will just go right ahead and get along all right and accept your Honor's decision as the proper one. I am sure, on the other hand, that if the defendant prevails or loses they will get along all right, too. So it is just a question, here, of trying to find out what is right—what is right under the law, and what is right under the facts. That is all.

These people issued this insurance policy, they collected their premium — they made a contract. On the face of it, it would seem to be that when this man lost twenty-six thousand dollars' worth of jewels or thereabouts and $951.00 worth of trays, it would appear that in spite of the [111] shock that came to him at the time, that he at least had some consoling thoughts, "Well, at any rate, I have paid my six hundred dollars or five hundred ninety some odd dollars and I have coverage for this loss." At least it must have so appeared to him, or else he surely would not have wasted the time to notify the insurance company on that occasion.

He filed his claim in due time. The police were called, I should say, first. Statements were made, which must have been consistent with the testimony here, generally—of course, in any lawsuit there are numerous statements, and we realize that there can be immaterial conflicts—but substantially the statement of my client must have been the same immediately thereafter. Otherwise, this astute gentle-

man would have surely had the police officers here to prove to your Honor that some different statement was made concerning the time my client was away from his automobile and things of that nature. Some of these gentlemen who were in the courtroom yesterday were kind enough to come immediately. I don't know whether they came to the scene of the robbery or not, or the scene of the theft, or the scene where it was discovered; but they came there at least somewhere that day and took a statement on Sunday. Apparently, they were making efforts to service my client at the time.

But lo and behold! After time has elapsed and a verified claim filed—proof of loss, each and every item [112] listed in minute detail—my client is served with some notice that he is to be examined under oath, I don't know, by some lawyer. I have forgotten the terms of it. So it perhaps occurs to my client then, "Well, what is the matter?"

Well, when the answer comes, we find out. We find, in addition to denials of everything practically except the making of the contract and a few other formal things, we find denials that my client sustained a loss in the sum of what he claimed. That is the first defense—general denials.

Then they come along with a second defense, which I believe is a general demurrer. As far as I know—I am referring to the pleadings—as far as I know, that has never been pressed.

Then we start in with the four affirmative defenses which they plead, which I think they are obligated to maintain not only factually but legally.

They plead the defenses which in general amount to exceptions to the coverage, and if the burden did not fall upon the defense by virtue of its affirmative pleading then certainly in right and in principle and in law, because it is an attempt to invoke an exception to vitiate a coverage, the burden rests upon these people. When the prima facie case is proved—the theft of the property and its value and the issuance of a policy—I believe every enlightened court in the land has held that if an attempt is made to bring the facts within an exception in [113] the policy, then the burden is on the insurer to do it. But more about that later.

The foremost reason that I wanted to discuss this matter orally with your Honor is that sometimes a person can communicate a little better when he is talking to somebody, and if there are any questions that come up we are here to discuss them, and if I make some misstatement or something Counsel can certainly feel free to call my attention, because we are trying to find out what ought to be done—where these parties ought to be legally when the court decides.

I introduced into evidence yesterday a policy, and I have a photostatic copy, and while I discuss these four exceptions I would appreciate it if your Honor could examine the provisions with me. Would you mind doing that, sir?

If I may approach the Clerk— —

The Court: Yes.

Mr. Ely: Give me my first exhibit, please, Mr. Clerk.

(The Clerk hands a document to Mr. Ely.)

Mr. Ely: If I may assist the Court, I think I can promptly open the policy to the points.

Maybe you can help me, George (Mr. Hauerken). I am looking for that exception (conferring with Mr. Hauerken off the record).

May I approach the Bench, your Honor? [114]

The Court: Yes.

Mr. Ely? This will be the first (indicating the document).

The Court: (H).

Mr. Ely: No; (I).

The Court: (I); all right.

Mr. Ely: I am going to take these special defenses in the order pleaded, your Honor, and merely because it is a convenient way to approach them.

The third affirmative defense, that is, after the general denial and the demurrer, is the invoking of this exception designated as, I believe, (I) or 5 (I), under the so-called insuring conditions to the policy. Now that language or that heading "Insuring Condition" may be significant, but I call your Honor's attention immediately under that heading to the sentence numbered 5: "This policy insures against all risk of loss or damage to the above-described property arising from any cause whatsoever, except * * *" and I call that to your Honor's attention because it is always important, in determining where the burden of proof rests, to decide whether or not an exception is invoked or whether or not a situation exists so that the exception is actually a part of the insuring clause.

For example, in an accident policy, sometimes we find the language that the company will insure against loss [115] or death caused by accident solely and independently of all other causes, and those instances, according to a recent case where George Penney was killed—your Honor probably remembers George Penney.

The Court: Yes.

Mr. Ely: Well, in that suit under that policy, where it was claimed that alcoholism or something else may have contributed to his death, the court held that because the policy read that the life was insured when death was caused by accident solely and independently of all other causes, that there the burden would be upon the plaintiff to show that nothing else caused it.

The Court: That is George Francis.

Mr. Ely: George Francis.

The Court: George Penney is still alive; he is down at Corona del Mar.

Mr. Ely: The reason I said Penney was that Penney was on the same trip and testified in the case. But it was George Francis.

But here we have, clearly an exception. It is designated an exception by their own lawyers who drew the policy. What does it say? "Loss or damage"—not "theft," but "loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle."

Now, let's look for a moment at what the cases say [116] about the way language should be interpreted. In other words, is the court to employ a

legalistic, precise definition in attempting to find out what "loss or damage" means, or is the court to apply ordinary every-day language as most people use?

If somebody robbed you last night and you were telling me about it this morning, would you be likely to say "I lost my watch last night," or "I sustained a loss of my watch last night"? Suppose you were held up at gunpoint. Or would you say, "I was robbed of my watch last night," or "My watch was stolen from me last night"?

That is the point, or one of them, that I am going to make.

There are four reasons, as I view it, why this defendant cannot, in good conscience and in law and under these facts, bring itself within the provisions of subdivision A. In the first place, the provision is ambiguous. It says "loss or damage while in or upon an automobile." It doesn't say "loss from an automobile," it doesn't say "theft from an automobile"; it says "loss or damage while in or upon an automobile." My first reaction to it, as just an ordinary person—not as a lawyer, necessarily, but as just an ordinary citizen, is "Well, how can anybody —what does that 'loss' mean?" If it means "lost," how can anything be lost if it is in or upon an automobile? If it is in or on [117] an automobile, it is not lost. So the thought was, then, that that particular clause must mean, or that particular exception must apply only to damage. Jewelry or any other article which is insured under this policy can suffer damage, either in whole or in part, while in or upon an automobile; but it cannot be lost, in any

common-sense viewpoint, if it is in or upon an automobile.

Now that is one common-sense approach, and I think it fits with the authorities to this situation. I think there is absolutely no question about the proposition that if there is any reasonable ambiguity in the terms of this policy, and especially, a fortiori, in the case of the exceptions, every reasonable intendment must be indulged against this insurance company; because it was their lawyers who drew it, and if they wanted to spell out that they were excepting from the policy theft from an automobile all they had to do was to say so. And for every policy, I dare say, that is couched in this uncertain language "loss or damage while in or upon an automobile," your Honor will find a thousand, if you investigate—and I think it is a matter of which you could take common knowledge—where the exceptions read "theft from." If they are going to exclude a theft, they say so.

I found support in the law for the just ordinary every-day approach from the standpoint of common-sense that I at first took of this exception numbered (I), in 25 Words and [118] Phrases at page 611. I am not going to go through the cases, but there are a number of cases that say that, in a legal sense, "loss" and "damage" are synonymous. Now where do I find in Words and Phrases that "loss" means "theft." To show that it is a different proposition, "theft" and "loss," you even find in Words and Phrases a separate heading defining "loss by theft." If "loss" meant "theft,"

there would be no reason for these insurance companies, as they apparently do from those cases listed in Words and Phrases, ever to use the terminology "loss by theft."

But I am getting ahead of myself. These cases at the page I have indicated say that "loss" and "damage" are synonymous; and if they are synonymous, if your Honor wants to follow those cases, then the company here cannot bring itself within the terms of subdivision (I). Even if we go ahead and we are going to concede for the moment—I have to arguendo—that they have proved that this property was stolen while my client was away from his automobile—which later I am going to prove to your Honor would amount to utter conjecture and speculation, if your Honor did find that to deprive my client of recovery in this case—but conceding arguendo that the defendant has met its burden that this property was stolen while my client was away from the automobile, conceding that for the moment, still I submit to your Honor that on the basis of what I have just pointed out subdivision (I) cannot apply, [119] because "loss" does not mean "theft," at least it doesn't beyond the peradventure of a doubt, and if there is any ambiguity, as I have said before, then there is no question and I think Counsel will not debate the thing that it must be and should be, legally and on principle, resolved against the insurer.

I told your Honor that "loss" and "damage" were held to be synonymous. I want to qualify that.

A New York case (Allemania Fire Insurance Co. of Pittsburg, 226 N. Y. Supp., cited in 25 words and Phrases) held that they were different to this extent: That "loss" was a part of "damage"—in other words, that "damage" was a part of "loss"; that a "loss" conveyed the meaning in law of complete damage, utter destruction, whereas "damage" was something less than "loss." But they are synonymous to the extent that they refer to the same thing and that is generally "damage," but only in a matter of degree. But even so there is no suggestion that it applies to "theft."

Now, I have said that there was an ambiguity. First, what is an ambiguity? We find that word defined in Words and Phrases—2 words and Phrases: it means doubtful, uncertain, equivocal, indefinite, indeterminate, unsettled. One court says it means "capable of being understood in more senses than one." One case says "obscure in meaning through indefiniteness of impression." One case says "having a double meaning." [120] Another case—and there are many, many cases, and I think this is a good approach to it—says that an ambiguity is something that is reasonably susceptible of two different constructions.

I submit, your Honor, that I have demonstrated that this subdivision (I) is capable of at least two and possibly three or four different constructions, and that not only would the court have to strain to say that "loss" meant "theft," but it would have to strain almost to the breaking point. It would have been so easy—and this is oftimes pointed out

by courts—it is so easy for these highly skilled and highly paid draftsmen of these instruments to write what they want to write, if their purpose is to clarify rather than to confuse or mislead. I can't help thinking again and again, if they wanted to say they were excepting theft from automobiles, how very, very easy it would have been to do it.

Let's go ahead for a moment, let's concede, "Yes, Mr. Hauerken, your technicality is good; 'loss' means 'theft'—'loss in and upon an automobile' means 'theft from an automobile.'" Let's concede that. And let's go further, Counsel. Let's concede that you have proved, by a preponderance of the evidence, that these jewels were stolen from that car while Mr. Schneider was looking at the diamond and was, so Mr. Hauerken says, away from his automobile. [121]

Mr. Hauerken cites some cases from other jurisdictions about this provision. He says, I believe in his memorandum, that it has never been interpreted in California. So he goes outside of our jurisdiction to get some cases from somewhere regarding this proposition.

Mr. Hauerken: May I offer a slight correction?

Mr. Ely: Certainly.

Mr. Hauerken: Under a jeweler's flooring policy, apparently it has never been decided in California. But I did say in my memorandum that this "in or upon an automobile" exception had been decided in California, in connection with medical payment coverage.

Christoffer vs. Hartford Accident Insurance

Company, 123 C.A. (Supp.) 979, at page 5 of my memorandum.

Mr. Ely: Excuse me. There is no question about that. I have handled occasionally myself an insurance case and I am aware of the fact as to an accident policy or a rider on an automobile public liability policy.

But right now I am talking about an insurance policy of this kind, or generally of this kind, and I am glad Counsel interrupted me, because it saves my reading this provision about "in or upon an automobile." You see, the problem here is as to whether my client was in or upon the automobile. That is, actually, an open question in this case—it is a serious question, and the California authority Counsel [122] apparently overlooked to me indicates that my client was never, within any reasonable construction of the law, away from the automobile, even if you are going to concede that we have gotten that far.

One of his own cases cited—I had better dispose of that, because it is a case from another jurisdiction—the second case cited, William Kinscherf vs. St. Paul Fire & Marine Insurance Company, 254 Appellate Division 385, cited the defendant, defeats it own contention, because in discussing a similar provision, similar to a certain extent in that it has to do with whether a person is in or upon an automobile, the court said, "Such language can only be interpreted to mean that if the permanent employee of the plaintiff is not actually within or on an automobile or so near thereto as to be able to

observe a theft of the contents, he shall not be deemed to be in attendance at the time the loss occurs."

Now, under the facts here, Counsel, in the very proof that has been brought out in behalf of the defendant in proving that my client was always within sight of the automobile except when he assigned Mr. Nigro, whose sole duty it then was to watch the automobile, under the decision cited by Counsel, my client was substantially in or upon the automobile, being in sight of it.

But I have a better case than that one Counsel gave, and I have a California case. It is an old case, but I daresay [123] that in 1888 or thereabouts these policy provisions were more strictly construed than they are now under a more enlightened and salutary rule of liberal interpretation. Now in that case, Sierra Milling, Smelting & Mining Co. vs. Hartford Fire Insurance Company, 76 Cal. 235 (18 Pac. 2nd 267), a fire insurance policy was involved, but the policy had an exception to the effect that it would not cover——

Mr. Hauerken: Mr. Ely, I don't like to interrupt you.

Mr. Ely: Feel perfectly free. I am not sensitive about being interrupted. You just go ahead.

Mr. Hauerken: 76 Cal.——

Mr. Ely: 76 Cal. 235 (18 Pac. 2nd 267).

I suppose interruptions bother some people who speak with precise pattern and orderliness, but I can't help rambling around anyway. That is why I

have already taken longer than I expected. So I don't mind.

Anyway, that fire insurance policy said that it wouldn't cover these poor folks unless there was a watchman in or upon the premises all of the time. He wasn't there when this fire happened, back there a long time ago. He was 65 feet away. He was a lot farther than my man was at any time, under this evidence. The same language: "in or upon the premises," and here "in or upon an automobile." The court said that it didn't make any difference. The case [124] concludes: "I think that from this state of facts the warranty is shown to have been fully complied with." The headnote reads: "By a policy of fire insurance on a mill, insured warranted that during all of the time the mill remained idle it would employ a watchman to be in and upon the premises insured night and day. At the time of the fire, the watchman was on the premises connected with the mill and a short distance from but not actually in the mill, and was engaged in watching over the premises and in position where he had better opportunity of seeing the property insured than if he had been in the mill building." And that is apropos here, because my client is out that is 15, 10, 7 feet away, looking sideways at the car, he certainly got a better view of what is going on than if he were actually sitting up inside the automobile. Held, that the warranty had not been broken.

In other words, technically, sure—as the defendant claims here; technically, Mr. Schneider was not with his foot or his hand on the automobile.

Can't your honor see the difference, since Counsel has brought up an accident insurance policy, a rider on a public liability policy, which insures while alighting from or while entering upon an automobile? The whole coverage, public liability and everything else, is connected with the operation of the automobile. Certainly it doesn't apply if a [125] man walks twenty feet and stumbles over a step. But we are dealing here with an insurance policy, a blanket block form of insurance policy, and they are trying to invoke an exception, and the California code—we don't have to go where he has gone for cases interpreting "in or upon premises" or "in or upon an automobile." We can stay right here at home. We can take this opinion from the Supreme Court. We find that, under the facts here, our man was more nearly at all times in or upon his automobile than the watchman ever was in that case.

The Court: We might stop to take a short recess at this time.

Mr. Ely: Goodness, have I talked that long?

The Court: How long do you want?

Mr. Ely: Let's take the recess. The others are not even important.

(Recess.)

The Court: All right, Mr. Ely, you may continue your argument.

Mr. Ely: In passing, your Honor, actually just for the purpose of calling to your Honor's attention the thinking of the courts, even right up to date, I want to mention Richey vs. Anchor Casualty, 135

A.C.A. page 33, where Judge Ashburn writes: "Normally, a business man who takes comprehensive insurance with express coverage of products' [126] property damage, would expect his ordinary transactions to be covered. If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear and unmistakable language. (Citing a case.) If this is not done, any ambiguity or uncertainty is resolved in favor of the policyholder. Indeed, an exception must be couched in terms which are clear to the ordinary mind or any doubts as to meaning will be resolved against the insurer."

There is stronger language. We find in McKinney's Digest, Volume 13 at page 263, under Section 60 on Insurance, this language from the case of Pacific Heating and Ventilating Company vs. Williamsberg, 158 Cal. 367: "The insurer is in duty bound to use such language as to make the conditions, exceptions and provisions of the policy clear to the ordinary mind, and in case it fails to do so any ambiguity or reasonable doubt must be resolved in favor of the insured and against the insurer."

In Mah See vs. North American Accident Insurance Company, 190 Cal. 421 (213 Pac. 42, 26 A.L.R. 123)—that case is interpreted as holding: "A proviso in an accident insurance policy which is uncertain or ambiguous, rendering it capable of either of two constructions, one holding the insurer liable and the other exempting him, must be construed liberally in favor of the insured and strictly [127]

against the insurer (1) because it is found in a policy of insurance, and (2) because it is found in an exception, attached to the policy, which purports to limit the risk assumed by the insurer in the general provisions thereof.

That is pretty strong.

To the same general effect is Coates vs. Zurich General Accident Insurance Company, 212 Cal. 576.

I am trying to limit these citations to the general rule, the supreme court cases, except the recent one I mentioned by Judge Ashburn, certainly one of our outstanding legal thinkers, I believe.

I told your Honor right at the beginning that we had to look at these things like ordinary people do, not like insurance lawyers do, as to the meaning of the language, and here is what I had in mind: I was thinking about Hyer vs. Insurance Exchange, 77 C.A. 343 (246 Pac. 1055), and that case holds: "The terms used in an insurance policy should be given their plain, ordinary and popular meaning." That's all. It makes sense to me.

Wilmar vs. Pacific Mutual Life Insurance Company, 168 Cal. 536 (143 Pac. 78): "Whatever the terms 'passenger elevator' and 'freight elevator' may mean technically to those engaged in the manufacture, these expressions in a policy of insurance are to be construed in their ordinary and popular sense." [128]

Now, the reason I wanted to bring your Honor's attention to those cases at this time is that there is still a fifth reason—I think I have already covered

four—why this subsection (I) cannot defeat my client here. This says "loss or damage to property while in or upon an automobile." It says "loss to property"; it doesn't say "loss to the owner"—it says loss to the property. How can "loss to property" mean anything other than "damage to property"? Because there cannot be theft to property. There can be a theft of property, sure. There could be a loss to the owner, perhaps, in a technical sense, by a theft. But this policy says "loss or damage to property"—loss to property. I cannot see at all, from a common-sense viewpoint, how the ordinary layman could interpret the language in this exception (I), loss to property—"loss or damage to property while in or upon the automobile," how could he possibly strain their statement and arrive, even if he were a lexicographer and skilful expert in the interpretation of hieroglyphics, at the conclusion that that language could be theft from an automobile, in view of the authorities we have already covered?

I said that was the fifth reason. That was the fourth reason why that language is ambiguous, the use of that word as related to property. The word was "loss" while in an automobile. Nothing could be lost. [129]

The third was the fact that the cases hold that "loss" and "damage" are synonymous.

And then, finally, if we got down that far, we come to the merits, and your Honor, if we get that far, you are going to have to ask yourself, Did this company prove by the quantum of proof required by law, a preponderance of the evidence in this case,

that this property was stolen at a particular time when this gentleman was looking at a diamond? That is what they have to do. Even if you resolve all my argument against me, they have to prove that.

I submit that it is just as reasonable, it is more reasonable to believe that a highly skilled gang of thieves, knowing this man as a prominent man, a reputable man of Long Beach—never even been in a courthouse before, been over there ten years transporting jewelry to his car—that knowing him, they followed him. His car had been parked for six months there, with a key in it. It would have been the simplest thing in the world for a duplicate key to have been made any day, with or without the cooperation of the parking lot attendants. Then they followed him out on this day. Perhaps for days they had been following him. They find him caught in heavy congestion of traffic in the rain, and in the traffic in a matter of seconds raise this back end twelve inches—he could not see it even if he were looking at that time—slide these cases out the twelve or fifteen inches and [130] are off. That would be the skilful Brinks-type of robbery to make. While they are in their automobiles, if things go wrong, they can get away. It seems to me that that is the reasonable hypothesis.

That if the burden of proof, by any conceivable reversal of the time-honored rules of our court, should be cast upon us, that we would have met the burden of proof to prove that the property must have been taken in transit, in view of the testimony of Mr. Nigro and this other gentleman. The burden

is not upon us. The burden is upon them to bring themselves within this exception.

But I shall not argue facts with your Honor, Your Honor has been deciding facts for twenty or twenty-five years. I will pass over that, because I want to finish.

There are three more defenses interposed here. The fourth has to do with mysterious disappearance or something like that. Let me see what it says. It is clause 5 under (N). I am not going to ask your Honor to try to look at the policy again, except I do want to say this: that in my memorandum, the one that was prepared for me, I notice that on line 7 at page 6 it is listed as clause 5 (N)—it should be (M). I will ask your Honor to change that.

The Court: All right.

Mr. Ely: I believe there is another place where it is mistaken as clause 5 (N). I believe it should be M. I [131] am not going to blame that on the fine print, although that could be an explanation. It is probably more due to Mr. Runkle's secretary's hearing.

This insurance company takes this clause, and I am going to read it all—it is another exception: "Unexplained Loss—Mysterious disappearance or loss or shortage disclosed on taking inventory," and with equal apparent good faith maintains that that clause should defeat my client in this case. I just am at a loss, actually, to explain why such should be maintained. It plainly says "Unexplained Loss—Mysterious disappearance or loss disclosed on taking inventory," just as plain as day. In other words, the

unexplained loss, mysterious disappearance or loss or shortage which is excepted from liability is that unexplained loss, mysterious disappearance or shortage or loss which is disclosed or found out on the taking of an inventory. It is plain. It is that loss or theft which is described by the phrases "disclosed on taking inventory," which has nothing to do with this case.

Well, loss was not disclosed on the taking of inventory.

This was not some mysterious disappearance or loss which we found out when we were taking an inventory, perhaps, and then compared it with an inventory taken a year ago, a complete inventory, and then found that some way or [132] other something was gone. We have explained this loss in this case. We have explained it to the point that reasonable minds could not differ; that is was a loss by theft, a loss while we were out doing our work. It was not disclosed or found out on taking inventory, as this exception provides. We discovered it then and there. It was disclosed on the opening of the trunk, not on the taking of the inventory.

Carried to extremes, how ridiculous could this defense be that is presented, your Honor, here, in apparent good faith—an unexplained loss, mysterious disappearance.

Suppose that in this instance someone had come up with a gun and held up my client and said, "Give me those diamonds," this jewelry, this twenty-six thousand dollars' worth of merchandise, and had

walked off with them. I can hear adroit counsel on cross-examination now: "Well, now, after this robber had gone with these diamonds, they just disappeared as far as you are concerned, didn't they? You don't know where they are, do you? Their whereabouts is unexplainable to you, isn't it? The robber took them and he disappeared. Their whereabouts at this time is unexplainable. Where they are today is a mystery to you, isn't it, Mr. Schneider?

"Yes; it is.

"Where the robber went after he took them is unexplainable to you, isn't it? [133]

"Yes; it is."

Counsel sits down with great satisfaction. He has brought my client within the exception of Clause 5 (M): Unexplained loss, mysterious disappearance, or loss or shortage disclosed on taking inventory.

Counsel presents defense number 5, which has to do with an inventory. In the guise of an exception, Counsel mentioned an iron-safe clause. It has nothing to do with an iron-safe clause—this policy of insurance. An iron-safe clause pertains to a fire insurance policy. An iron-safe clause certainly may be required in a fire insurance policy, where it is contemplated that a building may burn down and there may be absolutely no way, there is no way, even with the full compliance with the so-called iron-safe clauses in fire insurance policies, to assure that the loss can be ascertained precisely. But the purpose of it is clear that it is hoped that there may be preserved in fireproof equipment a list of valuables in

case of complete destruction otherwise by fire. This provision that is invoked here, Clause 8, I think—yes, Clause 8—is not even written in the same language as the ordinary iron-safe clause in a fire insurance policy, although Counsel would very much like to bring himself, apparently, from what he said yesterday, into that classification.

This matter is treated quite comprehensively [134] in Appelman's Insurance Law and Practice, Volume 5, and I just simply do not have time to go into it. I should have been away from here by noon, but my first duty is to the client I am representing in court right now, and so I have made arrangements that I can be back. In other words, I want to give this gentleman everything—I don't want him to be oppressed. That is the idea. I am going to finish in a minute. Now, beginning at page 86, Volume 5 of Appelman's treatise, there is talk about iron-safe clauses in connection with fire insurance policies. But even so, even if we had an iron-safe provision, which we do not have here, we would have complied. On page 89—beginning at the bottom of page 88, I read: "The inventory required must contain a sufficient statement to meet the requirements of the covenant. The mere keeping of invoices of goods purchased is not compliance in this regard, nor is the keeping of a set of books from which the amount of stock can be determined. Arkansas, however, has held that a combination of the two is sufficient, while West Virginia has taken a liberal attitude toward invoices where the stock consisted wholly of new merchandise. The inventory taken is required"

to show the items of merchandise upon the insured premises, the quantities thereof, and the value of each item as nearly as it can be ascertained, so that the insurer can determine after the loss whether such stock was actually on hand and whether the valuations therein given were [135] reasonable."

Now we leave the ordinary iron-safe clause and proceed to another clause which is more nearly in the language of the one here. I am reading from Appelman at Section 3024: "For the same reason that inventories are required, the insurer may require the insured carrying on a mercantile business to keep books so that the loss can readily be ascertained." That is the precise language here: "* * * to keep books so that the loss can be readily ascertained. Such a provision is valid even in the face of antitechnicality statutes and constitute a promissory warranty by the insurer."

I am not going to get into the technical distinctions of promissory warranties, but I think that it will be readily found by your Honor, and probably already known, that in applying what is a promissory warranty to this case, there just isn't any question but that my client complied with it and gave these people everything on earth that they were entitled to have.

I think you noticed that proof of loss, didn't you? That list of all these items that was submitted. Suppose that had been the only thing there was, just a list of these hundreds and hundreds of pieces of jewelry. Do you think these people would have paid? An inventory is a name, that's all. It doesn't

necessarily mean a list. That is a list [136] separate and apart. In the first place, he kept one—I don't want to overlook that—that he couldn't find. Of course, they want to asperse his motives, and in the memorandum there is an attack made on his character. But I would think that, with all the investigation available to the defendant, if there really had been anything in the background of my client which reflected upon his credibility, it could have been produced from the witness chair and not just by suggestion in a memorandum that he must be lacking—that there never must have been any inventory, anyway. He kept one. He couldn't find it. In any event, these people had the opportunity to come and examine every invoice, our books, our records, with their own accountant, and there is no contention that we didn't sustain the loss that is claimed for.

In that connection, you might look at this Michler vs. New Amsterdam Casualty Company, 139 Atlantic 725, and that was later affirmed by the Supreme Court in 141 Atlantic 920, which says that failure to keep any books—here we had books that their own accountant examined—does not void a policy of insurance against loss through robbery, although it provides that the company shall not be liable unless books and accounts are kept by the insured and the loss can be accurately determined therefrom by the insurer. Where there is nothing to show that the keeping of books and accounts was material or would have been in the least helpful and [137] necessary accurately to determine the loss of the insured——

Here we had books and records complete. Had we come in only with this itemized list, these people may have had some right to say, "is this supporting evidence for the value?" But we maintained an inventory in our place of business, by whatever name you want to call it. Disregarding for the moment the inventory we had and lost, the other records were an inventory, in any reasonable sense, in that they furnished the avenue to this company to find out if what we claimed was true; and that is all the law requires, and it is all in principle.

I am going to stop now and give the gentleman an opportunity.

The Court: All right. I guess the thought is that we will go over to two o'clock. We won't try to finish by twelve. You may start now. Mr. Ely wanted to finish by noon, but he says he made other arrangements not to hurry this.

Mr. Ely: I had a deposition that is set for 4:00, but I made arrangements for somebody else to meet my client at 3:00. I would like to be there, but if I can't, I can't.

The Court: We will let Mr. Hauerken speak, and then a lot will depend upon how long you talk in your closing. [138]

DEFENDANT'S ARGUMENT

Mr. Hauerken: If it may please the Court, it will be more orderly to give the argument that I intended to give, and I will try to answer, during

the course of that argument, some of the points Mr. Ely touched on, and those that I do not touch on during the course of my argument I will try to cover at the close.

The Court: Certainly.

Mr. Hauerken: We filed a rather detailed trial memorandum about ten days ago, which I feel fairly stated our position in connection with losses under a jewelry floater policy. There are a number of cases in there directly in point on jewelry floater policies. In the trial memorandum filed by the plaintiff, no cases are cited on jewelry floater policy, but the plaintiff's memorandum went off on the point of the burden of proof and ambiguity—those two points in the main.

I think if we start out with a principle of law that I would like to discuss, we can analyze the facts perhaps better. Counsel has taken the unqualified position that the burden of proof is on the Centennial Insurance Company in this case, for the reason that the Centennial Insurance Company is relying upon an exception. I think counsel had not mentioned the matter of a plaintiff seeking a recovery under an insurance policy at least making out a prima facie case.

Now, in the cases that Counsel has cited in his [139] opening memorandum on the point of exceptions and burden of proof, two of the cases do not even discuss that question, and they are the cases of Brown vs. Jerome and Horowitz vs. Commercial Casualty, which I think your Honor will find on reading he wholly disregarded, although they

are cited in principle for that point. It is true the other cases discussed the matter that once a policyholder brings himself within the coverage or makes out a prima facie case, that then and in that event if an insurance company relies upon an exception the burden is theirs. We don't dispute that. It is interesting to note that two of the cases cited by the plaintiff in the opening recognize the point that at least the policyholder must make out a prima facie case.

One of those cases is Rossi vs. St. Paul Fire and Marine, in the plaintiff's memorandum, which says: "In other words, a company must plead and prove the exception or breach which it sets up as defeating the plaintiff's prima facie right of recovery," recognizing that they must show that they have a prima facie right; and the other case is Carr against the International Indemnity, where they say: "Where proof is made of a loss apparently within a policy, the burden is upon the insurer to show that the loss was caused from a peril for which it is not liable."

I didn't realize what point counsel was going to make on this burden of proof thing, so I didn't cover it in my [140] opening memorandum; but there are a number of cases under all-risk policies, and for many years fire insurance companies insured the risk of fire and that was it, for many years marine insurance companies insured persons against certain named perils, and of late years marine insurance companies have been insuring against all risk and that custom has finally gone over into

the fire insurance industry where you can now purchase an all-risk policy on your home. But that is very recent.

I give that as a background to what I feel to be the reason why the all-risk policy and the matter of the burden of proof are to be found usually under marine insurance policies and in the Federal Courts. That would be a logical development.

In the case of Goldman against the Rhode Island Insurance Company, 100 Fed. Supp. 196, under an all-risk policy of shoes shipped from Argentina—all risk of loss or damage from external causes—the court said that the assured still had the burden of proof that his loss was caused by an insured peril. It seems that the shoes had become moldy.

Before I go on with these other cases on this point, I want now, if I may, to stress its application here. If your Honor will read the policy and this Clause 5, it will be seen that under the insuring conditions that we insure the merchandise described under all risk except under Clause 5, we do not [141] insure this merchandise while in or on an automobile. In other words, there is simply no coverage in or on an automobile. An exception, however, is that if the policyholder, the assured or a permanent employee of the assured, whose sole duty it is to attend the vehicle in or on it, then and in that event there is insurance on automobiles. What we would deduce from that is that the policy does not insure merchandise in automobiles, the exception being that it would if the policyholder is in or on the automobile. If the policyholder proves that the

loss occurred in and on an automobile, he proves no coverage under the policy unless he can put himself in the exception that he was in or on the automobile at the time.

There is a reason for that, and I am going to read from some cases to your Honor in a moment that I think will bring the matter more clearly to you.

The companies are willing to assume armed robbery and strong-arm methods and things of that nature, merchandise in the possession of a policyholder on a car. But here we are dealing with high value, small size merchandise. In fact, Mr. Ely made the point, and I think quite well, that his client had been some 22 years in the business. He is well known in the business as being a diamond man. For eight years he has had his own business, traveling around with property of large value in a car. Everyone doesn't walk around with twenty-six thousand dollars' worth of merchandise in the car. This man, [142] to use the vernacular, is a pigeon for people with larcenous intent. He is unarmed. He is a decent citizen. He is going to give up without a fight. He is not going to fight. It is a dangerous risk and one that the insurance companies are not willing to assume, your Honor, except upon certain conditions.

I would like to read, if I may for a moment, and before I go back to the burden of proof, language that is to be found in the Ruvelson case that we have cited on page 6 of our memorandum. This Ruvelson case is by the Supreme Court of Minnesota (1951), and Mr. Ely's memorandum to the contrary not-

withstanding saying that in all these cases I cited the clause was different from ours, in the Ruvelson case the clause was exactly the same as ours. The Ruvelson case takes all the cases, including the Kinscherf case—I cited them all, I felt your Honor should have them all—and takes them along in chronological order and discusses the matter of insuring jewelry in automobiles. They say it is difficult to conceive of a more effective deterrent to a potential thief than the presence of someone in or upon an automobile. It is extremely unlikely that an attempt would be made to steal from an automobile under the circumstances. And that is no doubt that very thing the insurer had in mind in requiring the actual presence in or on the automobile. Mr. Ely discussed a great deal about the ambiguity of this clause. The Supreme Court of Minnesota had no difficulty with that clause, nor did the other [143] courts that have decided on similar clauses. They said the language used in the exception involved here is clear and unequivocal. They say in another place, "The language used in the exception now before us is clear and unequivocal."

In the Ruvelson case, there was a thief. Mr. Ely has argued that loss or damage does not include theft. They did not present that problem to the Supreme Court of Minnesota or to the highest courts of the various states we have cited, and I will come back to them in a minute. But I briefly want to depart from my discussion to show you what the appellate courts of the other states have said, which I think will be persuasive with your Honor.

But staying now with the matter of the burden of proof, a prima facie case, in the Goldman case they held there was no recovery for the reason that the policyholder, under an all-risk policy, had not established a prima facie case. We take the position in this case that if your Honor should find that this loss was from the automobile, that then there has not been established a prima facie case, unless Mr. Schneider can prove, to the satisfaction of this court, that he was in or on the automobile at the time.

Now, the insurance policy, of course, does not go along with Mr. Schneider on his rounds, and of course the insurance policy can't testify. In a case of this nature, we are without witnesses. We rested our case without offering [144] any witnesses. The witnesses, if any there are in a case like this, are the policyholder and people with whom he is associated. So the matter of producing proof is within the power of the policyholder, your Honor, and not within the power of the insurance company. However, a person may scream to the high heavens how unfair this insurance company is for requiring proof. Well, I suppose if someone wants some money from an insurance company, they should prove that they have a loss. There is nothing wrong with that.

In the case of Western Insurance Company of Toronto vs. Shaw (11 Fed. (2d) 495), the Firemen's Fund Insurance Company vs. Globe National Insurance Company (Ninth Circuit, 236 Fed. 618), Solberg vs. Western Insurance Company (Ninth

Circuit, 119 Fed. 23), Arnold on Marine Insurance (Section 1283) all say that under a marine all-risk policy the burden is on the insured to show a loss within the policy risk.

I repeat, if he shows that this occurred in the automobile, he has shown that it is not insured, unless he further shows that he was in or on the automobile at that time.

There are a number of cases that I am not going to burden your Honor with under named perils where they insure against perils of the sea and so forth. I am limiting this to all-risk policies.

Here is the case of Caballero vs. Travelers Fire [145] Insurance Company—I'll agree it is not the highest court in the land, but I assume that every court has its dignity; I don't suppose we can be disrespectful of any trial court—it is the New York City Court, 1951 A and C 1825. This is a trial court decision. This case is very much like this one by analogy. Here a shipment of hosiery was insured all-risk from New York to Bogota as far as Buena Ventura, Colombia, by shipment by air. The goods were forwarded by truck rather than by air, and the court held that the plaintiff had the burden of showing that the loss occurred while on shipboard during the time it was insured and during the time that the warranty was breached.

Comparing that case to this case, the plaintiff has got to show that this loss that had occurred on the automobile had occurred at a time when he was in or on the automobile, or he can't recover. The analogy is precise, as I see it.

In the case of the Elmundo, which had to do with a risk hull insurance on a vessel, 1926 A.M.C. 1449, again there was a holding—damage to some boilers from some unexplained cause—under a war risk marine insurance policy, that the policyholder carries the burden of showing a loss to be caused by some fortuitous external event.

So there are any number of cases. There is case law building up now under all-risk insurance with respect to the burden of proof, and I suggest to your Honor that the law is, [146] as far as it has developed, and that the law should be that under an all-risk policy the policyholder first must make out a prima facie case. If we are asked for $26,000—and this could be a hundred thousand dollars or a million dollars in the next case—we are entitled to know why we are asked to pay. Wherein is it covered under the policy?

With that brief discussion, I would like to go into the matter of some of the testimony.

The Court: Certainly.

Mr. Hauerken: And some of the law that I feel is applicable to the testimony.

Something that is going to be very important, of course, is the credibility of the witnesses, the policy coverage in the law.

I want to touch on the only two gentlemen who testified other than Mr. Schneider.

May I see the exhibits, please?

The Court: Yes.

Mr. Hauerken: Mr. Ely seemed, to me—I don't know, sometimes lawyers are unduly sensitive when

they are trying a case—would seem to make undue capital whenever he would refer to these people that I had subpoenaed them. Well, yes, I did subpoena them, because I didn't know what Mr. Schneider would say when he got on the witness stand. My conclusion was that if he testified on the witness stand as he did in the [147] examination under oath, that I would not call these people, because I felt that a reading of the examination under oath, and I know that your Honor will read that after we conclude this argument, will clearly disclose that there is no claim made out in this proceeding that is recoverable, under the policy. Mr. Ely took the occasion to call these people to the witness stand—and they are his witnesses when he offered them, whether he subpoenaed them or not—which then gave me an opportunity to cross-examine them.

Now, there were two things that I felt I wanted to establish, and it is not for me to determine what the ultimate conclusions will be from the evidence, but I have been trying this case on the basis that, some way or other, this merchandise was stolen from the automobile, and I felt that after the examination under oath sometimes people re-examine their consciences after the depositions are taken and say, "Well, I have thought the thing over and now I remember." To guard against that is why I have these people.

May I approach the board, your Honor?

The Court: Certainly. Do you want to turn it around so I can see it?

Mr. Hauerken: Yes, your Honor.

Mr. Stelzer, in a statement that he gave four days after it occurred—and these are not important things, but they are things that you pick up. Where could this have [148] happened? The man said he had the car in view all the time. Possibly that is of some importance. Mr. Stelzer testified to a red zone at the top here defining Nutwood Street. He defined a red zone defining Nutwood Street to the lower part of the diagram. I never talked to Mr. Stelzer until in court a few minutes before he went on the stand, and he said in this statement that he gave that Mr. Schneider had parked his car in a red zone. And yet when he placed it on the blackboard here—that is the reason I wanted the witnesses excluded yesterday, your Honor. People hear things and they adopt things. I don't mean in bad faith or anything else. We are all human. Mr. Schneider and Mr. Stelzer are friends, and I would think the less of Mr. Stelzer if he tried to let Mr. Schneider down. I am not criticizing, but I am saying we are all human and one of the reasons we want witnesses excluded is to keep them out so they can't hear what the other fellow has to say, and accordingly, oh, you don't change testimony but you explain it, shall we say.

So Mr. Stelzer explained that when he said the car was in the red zone, that by that he meant it would be, as I used the expression, slambang in the middle of the alley, which simply had nothing to do with the red zone. If it had been in the red zone, as he said in the statement four days after the occurrence, and around the corner here—this is built up

to the property line. Then when Mr. Schneider and [149] Mr. Stelzer were in the alley 15 minutes looking at the gadgets in his car there, looking at the dashboard, Mr. Schneider said he was sitting in the driver's seat. It is true that Mr. Schneider said he had his car in the alley. Mr. Stelzer doesn't exactly place it there. If this statement was correct, the car was in a place where for 15 minutes he couldn't see it. It would have been a perfect time for that sneak thief Mr. Ely talks about, who took an impression of the keys while they were in the parking lot, to have gone in there. It would only take a minute. They had 14 minutes to the good. All they needed was a lookout to see that the men were not coming back, and bang the stuff is gone. It might have happened there.

On the matter of keys—this is a case of balancing equities, perhaps—I asked Mr. Schneider, "Did you leave your keys in the car during the six months you owned that car and had it in the parking lot?" Well, he said he did. Mr. Ely on cross-examination asked him, "Did you have to leave the keys in the car during that time so they could move the car around?" He said he did. What was overlooked at the time, but I didn't overlook it on direct examination—I asked him, "Do you use the same key for the ignition of your car that you use for the lock on your trunk?" He said, "Oh, no, that is a different key." I asked him whether he left that key to the trunk on his key ring in the car when he left it in the parking lot, and [150] he said he did. Well, anybody who is going to carry twenty-six thousand dollars'

worth of jewelry around in the trunk of that car and leave their key in a car like that so anybody could make a copy of it or get a duplicate of it, that is a pretty negligent thing, it is extreme carelessness, and if because of that conduct a duplicate key was made the cause of this loss—I don't mean to say I am wholly unsympathetic with Mr. Schneider; nobody could be—maybe he contributed to this thing by his own carelessness by leaving his key to the trunk in a place where somebody could make a copy of it, and if this statement is right, if Mr. Stelzer could not interpret as he attempted to interpret on the stand after hearing Mr. Schneider testify and realizing the importance of that thing, if he was parked around the corner that would have been a time when it clearly could have happened.

Of course, a statement like this can't be complete. But the only other thing that is somewhat contradictory—I don't know that it is important; it goes to credibiliy—Mr. Schneider says that they went in the alley, he parked right in back three or four feet in back of him, he got out, he got into the driver's seat, he is looking at the panel of the car and yet he is looking at his own car the whole time.

Now mind you, this is not a case where the plaintiff is contending that we have some weasel words hidden in the policy that the policyholder was unaware of and that because [151] he was unaware then it is somewhat unfair to charge him with compliance on this. All through this trial and all through the examination under oath, even in the proof of loss that was filed, there was a complete

awareness by Mr. Schneider not only of the value of the stuff that he was carrying around but of that warranty in the policy that he must be right there all the time. You saw how carefully he said, "Well, if I was not in the car, I was right there ten or fifteen feet away, five feet away, watching it all the time," something he was alert to, and the fact that he was so alert to it lends a great deal of strength to the language of the Supreme Court of Minnesota when they say that these clauses are put in the policy and are necessarily strict for that particular reason.

But the other place where he was perhaps a little contradictory of his friend, Stelzer, Mr. Stezler said he got in the car and was in there for about fifteen minutes—although he admitted he couldn't see the back of the car even where Schneider had it. Stelzer says that they were standing: "We both stood about fifteen feet in front of this Cadillac and looked at my Ford." Later on he said, "Maybe Schneider got in the car, maybe he stood." I don't know that that is important. But we are going to credibility and contrary statements made right at the time; not after a lawyer has been employed and the law is checked to determine what the legalities of the situation are, but right at the time. [152]

The other witness, Mr. Nigro, said that his statement, which was taken on December 7th, was substantially all he knew about it. And I asked him only one question—I said: "Did you have a heavy load of customers that day?" He said, "No." The one thing that Mr. Nigro was put on the stand for,

it would seem to me, was that the minute or two that Mr. Schneider is supposed to have looked at this diamond with a 10-power glass and possibly turning his back on it, is that somehow or other in military fashion Mr. Nigro takes up the vigil of watching this car. Well, there is nothing like that in this statement. Your Honor will read it later. He says, "At intervals I was called away due to the heavy load of customers." But there is nothing in this statement at the time about his watching the car, not a thing. You have heard Mr. Schneider's testimony in court about watching the car. Apparently it is a very important thing that the car be watched. Mr. Nigro now finds that he played the part of a watchdog there. I don't think Mr. Nigro's testimony is very strong. I think you would be inclined to discount it. I don't think it makes much difference one way or the other, except to the extent that it might have something to do with the credibility of Mr. Schneider.

Now, I have discussed the matter of the clause in the policy, about the burden of proof, and I want to review something further about the situation at the time. In this [153] parking lot for six months he left his trunk keys in the car. It was not necessary to leave the trunk keys there, but he did. He said he knew of other jewelry losses at the time from cars—I think he said about two—jewelry thieves. It is notorious that jewelry thieves are sneak thieves. He says he was well known in the trade.

Then there is another interesting thing. May I

have the statement that Mr. Schneider gave on December 3rd? It is a rather long one.

The Court: All I have here is just the policy.

Mr. Hauerken: Yes, I have it here. This was given the day that it happened. Mr. Schneider says, "About three weeks ago or thereabouts I noticed a blue Cadillac evidently followed me from Long Beach, stopped at Hermosa Beach and I made a stop and I noticed that the car parked across the street. I was in the store at the stop for about five hours and decided if the car was there when I came out I would call the police. I did not take any license number of this car since first I thought it might have been a coincidence, and when I came out the car was gone. I have not to my knowledge seen this car again."

Well, now, Mr. Ely suggested that these sneak thieves follow these people around, by constant observation, watching them. Easy to get a copy of that key in that parking lot. I agree with all that. I don't agree that it was necessary to [154] leave the key to the trunk on the key ring in the parking lot. Then they couldn't have gotten that key so easily. But even at that possibly they might have gotten a duplicate key by checking into the lock. I don't know how they do those things, but I understand it is possible.

Mr. Schneider, all through his testimony, is alert to the fact that he is subject to this sort of thing. He has been followed a little bit before. He has high value. They are watching his car. So he has to stay close to his car. That atmosphere, that climate is

in this case of extreme care. That atmosphere goes right into this clause which says that we will not insure stuff in automobiles unless you are in or on the automobiles, and I feel that your Honor will ultimately conclude that that is the interpretation of that particular clause and a proper one, in taking the equities of the case as to who has the ability to prove under a situation like that. That is something to be considered.

Now, let's see what was stolen and whether it could have been stolen easily while Mr. Schneider was in the car. First of all, there is a trunk well in the back of the car, which, I think, Mr. Schneider said was about five inches deep—at least the stuff wouldn't slip out. He said the trunk would lock all the time. Now the cases that were in there were each 65 pounds. Now 65 pounds is not something that you juggle around like a toy, particularly if it is an ungainly looking [155] think that is four and a half feet by thirty inches by twenty inches. How could anybody have taken these things out while the car was on the run, as suggested by Mr. Ely? In the first place, they would have to take them out the twenty inches, and five inches and twenty inches is twenty-five inches that that lid has got to go up, and they couldn't get it out in that space. They would have to lift up the hood more. And I am going to touch on some of the testimony about the trunk of the car coming up. It is just without belief that anyone could have taken those big, ungainly, heavy cases out of that car without getting the trunk up pretty high.

Here is a man who lives in mortal fear of somebody's stealing merchandise from his car. He watches it like a hawk when he is three or four or five or six feet away from the car. He never goes more than one or two feet inside a store, and yet we try to be casual about the whole thing about not watching that trunk while he is in the car and driving along. Your Honor is familiar with the Coupe De Ville, the Cadillac-type automobile he was driving. Your Honor is familiar with the fact that everybody drives probably with one eye on their rearview mirror and with their other eye on the windshield looking at the road ahead. Would it not be a matter of alarm to him if that trunk started to come up a little bit?

In the examination under oath, Mr. Schneider admits on page 24 at line 20, "The back will come up if not locked." [156] On page 24 at line 26 he said that the back did not come up at any time that day while he was in the car. At page 25, line 4: This means that the trunk was locked when driving. At page 35, line 26: Going from Bruce's to Joy's—he showed the merchandise at Bruce's. He said he put it back in the car and locked the trunk. So it seems to be definitely established, at least up to Bruce's, that he still had the merchandise. At page 35, line 26, he did not see the back go up. At page 37, line 7, during that trip, he repeated, he did not see the back go up. At page 37, line 9: During that trip, he said he would have seen it if it had gone up.

Now, if we are asked to believe this man in certain respects, I suppose we should be asked to be-

lieve him in these respects, too. He is the one who is the claimant in this case, and I don't think a trier of fact should be called upon by counsel for a litigant to believe only that part which will produce a tangible result and not to believe any other part of it.

At page 49, line 8, and page 49, line 21: On the trip from Joy's to the California Premium Service —that is where he discovered it was gone—he did not see the trunk go up. Now, from Bruce's to Joy's, page 36, line 18, he says there was nothing unusual in his trip over there. At page 50, line 10, On his trip from Joy's to the California Premium Service, he said there was nothing unusual about his trip [157] going over there.

On that testimony, how is any reasonable, thinking person to believe that these two cases were stolen during that time? It is simply incredible.

The Court: This might be a good point for us to stop now and then resume at 2:00 o'clock.

I will return this exhibit to the clerk, too. 2:00 p.m.

(Noon recess.) [158]

Tuesday, March 27, 1956—2:00 P.M.

Mr. Hauerken: When I was concluding this morning, I was discussing the matter of the trip from Bruce's Jewelers to Joy's and from Joy's over to the California Premium Service, and pointing out the examination under oath, which was affirmed in testimony here, the utter impossibility

of anything being taken from the car during that trip. And one thing occurred to me during the luncheon recess: Mr. Ely suggested that possibly it occurred during this trip from Joy's to California Premium Service, the last one, and it was suggested as a result of the testimony that it took so long to get there—40 minutes, some four or five miles, because of the cars coming out of the airplane factories and the mass of traffic, cars bumper to bumper.

Well, I imagine the American public is the same wherever the American public is to be found. It is hard for me to imagine a car being stalled in traffic bumper to bumper, the man driving his automobile, and other fellows coming up and opening the trunk and running away with a couple of big cases, without a lot of horns being blown or a lot of commotion raised or something like that. One might wonder just where those people would get away and how they would get away in such heavy traffic. If anything happened there, there certainly would have been an alarm of some kind, and it [159] certainly would have been difficult to escape.

I suggest to the Court, on the sneak stealing, that a sneak thief is not a brave man. A sneak thief has a lookout. A sneak thief is not a brave man. A sneak thief has a lookout. A sneak thief has a good getaway and he has a car and he is going to get away fast. I suggest to the Court that the type of thievery that goes on from automobiles, if a theft occurred from this automobile, it occurred at a time when the

car was stopped and Mr. Schneider was not in and about the car.

Now, we are entitled to some proof of some kind from Mr. Schneider, and I want to just refer back again to his statements. He says, at page 35, line 19, that he doesn't know if the cases were stolen between Bruce's and Joy's. At page 35, line 21, he hasn't any idea if they were stolen then. At page 36, line 7, he doesn't know where the cases were stolen. At page 49, line 18, he doesn't know if the cases were stolen between Joy's and the California Premium Service. We are entitled to something for our $26,000, and if I am correct in my suggestion to the Court that he has to make out a prima facie case before we even talk about burden of proof and if I am correct in my assumption that we simply don't insure merchandise in vehicles unless he proves he was in vehicles, he has wholly failed. I think that even if a court should conclude that I were incorrect in that assumption, which I do not suggest that I am, that the evidence of this man, and he is the only man who can testify—we can't [160] be taxed for not producing witnesses. We have to go on his testimony.

Now, the activities at the Joy Jewelry Company were such that he drove up in front, had a chat with Mike Stelzer, drove around the block. I have tried to demonstate that, if English language means anything—"red zone"—that they probably parked that car around the corner. Mr. Schneider says 15 minutes. It would have been a beautiful time to get away with that stuff, if they had keys, and they

must have had keys because there were no visible signs of entry. We get on over to the California Premium Service. He was in there quite some time, examining some jewelry. I think Mr. Schneider is sincere. I don't think, if they gave him a diamond to look at, that he would put on an act looking at it and not be looking at it. He says it would take at least a minute even if he knew it was his own jewelry.

I am going to read from one of these cases. There was a theft in which the stuff was stolen in two minutes. The car stopped, the man got out, and bang his stuff was gone. That is the way sneak thieves operate. It is a fast operation.

Mr. Schneider had his car outside of the California Premium Service for some time. Not only was he in there examining the jewelry and talking to the prospective customers, but he made arrangements with them, and the examination under oath will show, that if the lady didn't like that diamond she [161] might come over to his place of business and buy a diamond, presumably from the California Premium Service but out of his stock, and the examination under oath will show that she did that. That all takes time to arrange those things. He was inside the store. He was not in or on the automobile.

With that, I would like a few minutes' time to discuss some of the authorities I have laid out in our memorandum.

The Court: Certainly.

Mr. Haverkeu: The last appellate case I have

been able to find is this Ruvelson case, at page 6 of my memorandum, decided by the Supreme Court of Minnesota in 1954. In that case there was the same type of policy that insured the property of a wholesale jeweler against loss or damage arriving from any cause whatsoever. It also contained a clause which, except for one immaterial difference in spelling, was word for word with our Clause 5(I). I said it was exactly the same; I will correct that—there was one change in spelling, one word. The insured became sick while traveling in his car and left his car for two minutes to go to the bathroom and to buy a cup of coffee. During that time the jewelry was stolen. The court held that the loss was not covered by the policy since it occurred without the actual presence in or upon the car of the person who was in charge of the jewelry. I am quoting from the case now. Normally, I don't like to read from cases—I know it is tedious, but this is so right on [162] the point I think I should, if you will bear with me. The court said: "Plaintiffs readily concede that Olson was not actually in the car, but contend that the word 'upon' has a broad meaning which should be construed to be a substantial equivalent of, in proximately to, in the neighborhood of, in the presence of, in charge of. We have not had the occasion heretofore to construe the precise language in the insurance policy which we now have before us. Courts in other jurisdictions have uniformly construed this and similar language adversely to the contention of the plaintiffs."

The case of William Kinscherf—that is the case

counsel referred to this morning—has the same language. It involved an action on a similar insurance policy, containing a clause excepting liability for loss or damage to property insured hereunder while in or upon any automobile, motorcycle, or horse-drawn vehicle, unless such conveyance is attended at the time. The Kinscherf case did not say "in or upon the vehicle," and another case points that out. The loss occurred while the car of plaintiff's employee was parked at the curb with the doors and windows locked and the employee calling on a customer and had lunch. In denying recovery, the New York court said, "Such language can only be interpreted to mean that if the permanent employee of a plaintiff is not actually within or on an automobile," and then they said, "so near thereto as to be able to observe the theft of the contents, [163] he shall not be deemed to be in attendance at the time of the loss." Now mind you, the word is "attendance." The court will distinguish that they changed the clause and the wording of the title.

In Greenberg vs. Rhode Island, a New York case, we have an action on a similar policy, excepting liability for loss or damage by theft and/or attempted theft from any automobile or motorcycle, unless at the time the loss occurs there was actually in or upon such vehicle the assured or a permanent employee of the assured or a person whose sole duty it is to guard the property. The court commented upon the difference in the language of the Kinscherf case, saying that there was no requirement in the Kinscherf case, as here, that at the time

of the loss the assured or his permanent employee or person whose sole duty it is to guard the vehicle shall be actually in or on the vehicle.

So that disposes of the argument Mr. Ely made in connection with the Kinscherf case.

"Actual" means that which exists in fact or reality, in contrast to that which is constructive, theoretical or speculative.

The facts in the Greenberg case showed that the plaintiff, the insured, had the jewelry in possession and left it in the car with all the doors locked and entered a restaurant. Prior to entering the restaurant, the assured [164] requested another party, a stranger standing near his car, to watch over it and promised to pay him a dollar for his services. The insured returned about an hour later and discovered that one of the doors had been pried open and the property stolen. The court denied recovery, saying that the language in exclusion clause D is clear and explicit. Mr. Ely said the clause was ambiguous. This court says that the language is clear and explicit. The court says that it is manifest that the loss falls within the exception and that no liability is attached to the defendant under the policy and that plaintiff is not entitled to recover.

In the Dreiblatt case, another New York case, the same holding.

In Princess Ring Company vs. Home Insurance Company, the policy of insurance contained an exception in these words: "Loss or damage to property insured hereunder while in or upon any automobile." Now mind you, they are using the words

"loss or damage." Counsel said that when you say "loss or damage," that doesn't include theft. Apparently other courts haven't thought so. They thought if you lost something, you could lose it by a theft, or if it is damaged it is damaged. Counsel suggested that because we say "loss or damage" and that loss or damage is synonymous that there is no suggestion that loss or damage applies to theft. Yet in all these cases where they insure loss or damage, there was a theft, and the [165] court in each case —I don't know, maybe it might be said it hadn't occurred to them, but I don't know that these men are any less intelligent men than we are here today, and if that was a good argument it might have been raised before.

Anyway, in the Princess Ring Company case— "loss or damage unless attended at the time by a permanent employee or person whose sole duty it is to attend the vehicle and who at the time shall remain in or on the conveyance"—the court said, "The employees of plaintiff in whose care the jewelry was entrusted stopped in front of an apartment house in which his brother lived, intending to take his brother with him to see a prospective customer. He parked his automobile within ten feet of the entrance of the apartment house where his brother lived, turned off the ignition and left the key in the switch. Then he asked his brother's father-in-law, George Mott, who was sitting on a ledge watching his grandchild play, to watch his car while he went and rang the bell to summon his

brother. He saw Mr. Mott leaning against the car—that is a lot closer than Mr. Nigro was—with his elbow inside the window, and walked about 40 feet into the courtyard. As he started to ring the bell he heard Mr. Mott call. He ran out to his car and saw a strange man at the wheel. He ran around the front of the car and had one foot on the running board and his hand on the steering wheel when he was pushed off, the car started, and the thief made away with the [166] automobille."

The court, in denying recovery, said: "The phrase 'shall remain in or on the conveyance' fixed the place where the plaintiff's automobile was required to be when the property insured was in or on an automobile. The same phrase is used with reference to property insured on the person attending the vehicle. Both must be in or upon the vehicle. Opportunity makes the thief. If Mr. Mott had been in the automobile, probably the thief would not have entered."

That is a pretty strict construction. A man leaning on the car, with his arm in it, and yet they say he was not in or upon the automobile and denied recovery under this very clause, the clause which Mr. Ely suggested to the Court is ambiguous. The court did not find it ambiguous, "The language in the exception now before us is clear and unequivocal, and it requires the assured or a permanent employee of the assured or a person whose sole duty it is to attend the vehicle to be actually in or upon the automobile when the loss occurs. It is claimed that a strict construction of the language used by the

parties in this exception would lead to absurd and unreasonable results."

I am reminded a lot of the analogy or parallel that Mr. Ely drew this morning, that adroit counsel—I suppose that was me—in a case where a robber disappeared with the car, that I would contend that that was a disappearance within [167] the meaning of the disappearance clause.

But you can't draw absurd or unreasonable conclusions, and the court says, "In support of this contention plaintiff cites various hypothetical situations in which an insured or his employee would be compelled to leave the car either to secure help in an emergency or where he involuntarily would be required to leave the car unattended for some reason or other beyond his control. It is entirely possible, under such circumstances, that it would work a hardship on the assured if a loss should occur. But the plain fact is that it involved a risk which was assumed by the insured and not by the insurer. The result is no different from that of any other loss which occurs as a result of some loss not covered by the insurance."

I might for the moment draw an absurd parallel. I insure my house against fire. It is damaged by flood. Why should I collect under my policy? The mere fact that the assured is compelled to assume a loss which has not been covered by the insurance will not justify the courts by process of judicial construction in stretching words beyond their usual meaning to it to accept a risk not covered by the policy of insurance.

"The exception was obviously intended to cover any situation where a loss occurred when the property was not protected by the presence of someone in or upon the car, as [168] required by the language of the section involved. But it is difficult to conceive of a more effective deterrent to a potential thief than the presence of someone in or upon an automobile. It is extremely unlikely that an attempt would be made to steal from an automobile under these circumstances. The language used in the section involved here is clear and unequivocal. It provides an exception to the general coverage provisions of the policy. The parties were free to contract as they saw fit and it is not for us to rewrite their contract by construing language to mean something which it obviously does not mean.

"The plain fact is that this insurance policy covered certain types of losses and excluded others. The loss here involved was one assumed by the owner of the property and not by the insurer."

Since that case, there has been a case on the very clause decided in the United States District Court in New York. I wrote to the attorneys back there and I don't know that it has gone beyond judgment. I secured the file from the attorneys so that I would be sure I would know what I was talking about when I was discussing the case with your Honor. The case is from the United States District Court, Eastern District of New York, Civil Number 10277. It is a court of equal dignity with this court. It does not have persuasive authority over an appellate court, but I believe it is a [169] persuasive author-

ity. This case, on a clause exactly identical with the clause in our policy, held for the insurance company in a case where the policyholder had a blowout, he stopped his car, he asked someone standing there to watch his car and he would give him a dollar, while he went down to the garage. His merchandise is said to have been stolen out of the car during that time that he was away. I have here a copy of the findings signed by the judge in that case, and the finding is: "At the time of the theft, there was no one actually in or upon the automobile from which plaintiff's jewelry was stolen." I would be happy to lend my file to counsel. Both the plaintiff's brief and the defendant's brief are in here. There is a motion for summary judgment. I have both sides of it, if you want it.

The Court: I wrote the number down. If I want it, I can ask for it.

Mr. Hauerken: At first blush, getting a case like this for the first time, it might seem somewhat harsh to your Honor. One is always inclined to sympathize with a person who has suffered a loss, and all too frequently we look at insurance companies not with the same type of sympathy that we might look at a personal claimant. But the cases are clear and there are so many of them and none of them seem to have gone the other way. Nowhere do we find this ambiguity counsel suggests. Instead, we find "clear and unequivocal [170] language." Nowhere do we find any attempt to construe this policy as counsel has suggested.

The man was in and out of his car at various

times between Bruce's and the California Premium Service, when he said he discovered this loss.

There is another thing I want to suggest to your Honor that seems incredible to me, perhaps somewhat of a delicate subject. This man did not go to the toilet, according to his examination under oath and his testimony here, from the time he left his place of business before 10:00 o'clock in the morning until sometime around 4:30 or 5:00 o'clock in the afternoon after he discovered the loss. That might be possible. It seems to me that it sort of defies the law of nature. In the examination under oath, at page 30, line 9: He did not go to the toilet at the restaurant. At page 47, line 1: I did not go to the toilet between the time of putting the stuff in the car at Bruce's and leaving Joy's. At page 47, line 10: He did not go to the toilet between Joy's and the California Premium Service. At page 47, line 18: He does not go to the toilet during the day. At page 47, line 21: He went to the toilet before he left the office. And at page 47, line 22 and page 48, line 1: At no other time that day did he go to the toilet until after the loss.

We are discussing in this court the matter of credibility. I suggest to your Honor that that seems to be [171] lacking.

If in the case that I read here a few minutes ago, that a man went to the toilet and went to get a cup of coffee and was gone two minutes and such similar theft occurred, you can see from cases that have been decided in other jurisdictions under such factual situations that such theft is pretty

speedy. It is in line with Mr. Ely's suggestion of skilled people, people who steal jewelry lying in wait, watching this man, knowing all his movements and following him around, and when the time comes they strike and go.

Now, on this question of lack of knowledge—and I am talking about lack of Mr. Schneider's proof, and I am talking also about lack of evidence—no lawsuit should be won by any plaintiff without some evidence. At page 61, line 23 of the examination under oath: He told the police he really didn't know where it happened. Mr. Ely suggested that the police report bears that out or we would have brought it in here. At page 61, line 26: He told the police he didn't see anything, and the police report bears that out or we would have brought it in. At page 66, line 17: He hasn't the slightest idea. At page 66, line 22: Again he hasn't the slightest idea. At page 67, line 1, it is wholly unexplainable. I suggest to your Honor that in any lawsuit there must be evidence of some kind. He doesn't ever have any evidence as to where it happened, as to the fact even that [172] it was in the automobile when it occurred.

Now, we will come down to the clause which has to do with mysterious disappearance. Counsel did not read the entire clause. I would like to read the entire clause.

The Court: Certainly.

Mr. Hauerken: This is Clause 5(M): "Unexplained loss, mysterious disappearance or loss or

shortage disclosed on taking inventory. Nor shall this policy cover any shortage of goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order, with seals unbroken, nor for loss of or damage to goods when sold C.O.D. with the privilege of inspection by consignee before delivery."

Counsel suggests to the Court that that clause applies to taking inventory only. If it was intended by the insurance company to exclude loss solely in the taking of inventory, all the company had to do was exclude any loss or shortage disclosed on taking inventory.

It is away down at the bottom, your Honor.

The Court: I have it.

Mr. Hauerken: All they needed to have done was to have excluded any loss or shortage disclosed on taking inventory.

One might ask, why do they put in this shortage in inventory clause something which has to do with packages [173] received in apparent good order and condition and with the seals unbroken? Why, in this inventory clause, do they talk about stuff that is sent C.O.D. with the privilege of inspection? That has nothing to do with inventory. You will notice, "and unexplained loss, mysterious disappearance of loss or shortage disclosed on taking inventory;" that is in the disjunctive. That clause, I feel and we suggest to your Honor, is clear and there is no ambiguity to be found in that particular clause.

We are dealing here, we must always remember, with high value merchandise, something that is

easily stolen, and incidentally in cases where there can often be things mysteriously disappear, and I suggest to the Court that there is only one reading of that clause: That an unexplained loss—and counsel frankly says he can't explain it—is simply not covered by the policy. He has proved by his testimony that we come within that exception, or to the extent that it be deemed to be a mysterious disappearance; to the extent that we have the burden of proving that exception, we have proved that by his testimony.

I suggest to your Honor that in 27 Words and Phrases (the 1956 pocket part) page 222, they discuss the disappearance occurring in unexplainable, unaccountable or unknown manner; they discuss the meaning of that particular language. If we are to say that this clause was to mean only an [174] inventory shortage, then I think at the same time we must say that the insurance company wrote a clause that is six and a half lines long that they could have covered in half a line, and it seems so clear to me that one kind of loss is an unexplained loss, another kind of loss is a mysterious disappearance, another kind of loss is a loss which is shown up on an inventory, another kind of loss is one where you send a package and it gets there with seals unbroken and the Lord knows what happens to the contents, another kind of loss is a loss that you send C.O.D. with the privilege of inspection by the consignee and somehow or other the material is lost.

I realize, as counsel suggests, that many lawyers

suggest to courts that an insurance policy should be tortured.

The Court: Tortured?

Mr. Hauerken: Tortured, and I think possibly sometimes an insurance policy may be tortured a little bit. But I think this is so clear, and I am sure your Honor has neither the desire nor the intention to torture a policy—I don't suggest that, but in argument on behalf of a client I suggest you would have to torture that clause in order to come up with the conclusion that counsel suggests.

The next clause that I want to discuss is this one about inventory, and that is the Clause 8 and it is on the reverse side of the form that your Honor has seen there. I haven't been able to find any authorities on this particular [175] clause in connection with the jewelry policy. As a matter of fact—this is not in the record; it is just of my own personal knowledge—this matter of all-risk insurance on jewelry, this all-risk insurance is recent in nature. But the authorities that you can find of keeping an inventory are in the "iron safe" cases, they call them, because as counsel suggested they are in fire cases and you are required to keep this inventory in an iron safe so that a fire which burns up the contents of the building will not burn up the inventory, and the purpose of it is to make it easier for the insurance company not only to check the amount of the loss but also to check the legitimacy of the loss, whether the man had actually in his building when the fire occurred the type of merchandise he said he had.

To my mind, we have here, first, a mysterious disappearance of this merchandise, and then we find out that there was one inventory which was given as a model, another inventory which was made up after the loss. The policy says there must be one maintained before; and then later on there is this amendment to the examination under oath, which will be found appended to page 16 of the examination under oath, and at that time he said he had an original inventory and he would get it and produce it. We don't charge anybody with anything. Counsel suggested that I was attacking the man's character in my memorandum, and what counsel has reference to— [176] this is what I said: "It is our earnest contention that there never was any such inventory or listing. We simply cannot believe, and we hope that this Court will similarly find it is unable to believe, in the mysterious disappearance of the inventory on top of the mysterious disappearance of the jewelry itself." I don't think that is attacking the man's character. It is a comment.

Now, the cases on the iron safe clause—I have cited a number of A.L.R. citations in the memorandum—these cases frankly say it is a hard clause, and it is a hard clause. But I suggest to your Honor that insurance companies are entitled to some rights, too, and in holding the iron safe clauses to be valid —the courts have so found. There is no sense in going into all these iron safe cases. This clause is not the same as the iron safe clause in the fire policy. Mr. Ely is right. The language is different. But it is, I suggest, to the same effect. I mean, the minute

you adopt a new clause, if you can't get the benefit of a body of law that has been built up, that would mean everything would stop. We can't change anything to perhaps make things more clear.

So I suggest to the Court that the plaintiff has to satisfy the Court on two points in order to be successful in this lawsuit: First of all, they must satisfy the Court that this merchandise was stolen out of the car while Mr. Schneider [177] was in it, because we simply don't insure the merchandise unless Mr. Schneider was in the car; second, that this mysterious disappearance—if they satisfy the Court that this was stolen from the car while Mr. Schneider was in it—and there is no evidence to that effect—they must also satisfy the Court that this was not a mysterious disappearance, if they hadn't satisfied the Court as to the stealing of the same, in order to get around this mysterious disappearance clause. And then lastly we have this inventory clause.

In closing, so far as the argument in the main is concerned, I want to touch on just one or two points. I think I have covered most of them. I would like to invite the attention of the Court that I questioned Mr. Schneider: Did this happen on your premises? Did it happen here, and did it happen there? My reason for it was this: Under the policy, there is a forty thousand dollar limitation of liability if the stuff is stolen from his premises, there is a twenty thousand dollar limitation of liability if it is stolen from first-class registered mail or from the railway express or from an armored car service or from a safe or vault or bank

of any safety deposit company, or if it is stolen from the custody of a dealer similar to the assured. It doesn't come under any one of those three if there is a loss which is recoverable. If there is a loss which is recoverable under this policy—and this is merely in terms of argument, I feel I must point this [178] out to the Court—under subparagraph (E) there is a limitation of $15,000 in respect to property lost but not included in other locations, with this exception: that there is a rider attached to the policy that in the case of sample cases that it is not to exceed $2,000 insurance. That was our last defense on this.

So I think we have got this matter of ambiguity pretty well covered by the cases, with the Ruvelson case and this Ulrich case of New York all saying that this particular clause is clear and concise. I think all those cases are complete authority for the fact that when you insure against "loss or damage" that that "loss or damage" wording means a theft. All the cases carry it almost automatically without even a discussion of it.

Counsel discussed one case here, this California case, 76 Cal. 235——

May I borrow it?

Mr. Ely: Certainly.

Mr. Hauerken: I had not seen that case before. Thank you. During a little recess I looked at it.

The court held in this particular case—as counsel said, there was a provision in there that there had to be a watchman on the premises, and the insurance company did defend on that ground and the insur-

ance company lost—the court said that although the blacksmith shop—that's where the [179] watchman was situated—was not insured, it was, in point of fact, upon the premises of the insured property. So they collected. On page 238: "Here it is clear the watchman was employed to do what the policy required." There is some other language in here—that the watchman was on the premises. They referred to another case, distinguishing it. I haven't had an opportunity to read it, but it would seem in that case the insurance company won. Although I don't want to suggest that is the case, but they distinguished in this case that the man was on the premises and that therefore the warranty was complied with and therefore the insurance company was not entitled to take advantage of that exception.

Mr. Ely talked a great deal about the popular conception of language. That is right, that is what the cases say, the popular conception of language, and I think in all these cases I have cited in my memorandum that in or on an automobile, that that is a popular conception of language, and that therefore there is no ambiguity.

I think, your Honor, that just about concludes the remarks I want to make. I want to thank you very much for your attention, not only to the evidence but to the arguments presented by Mr. Ely and myself, and if you think any written memorandum may be of any help to you I will volunteer to do that. I have the feeling that lawyers are better on paper than they are by word of mouth. We are

too frequently carried [180] away with our own emotions or our own discussion at a time. Words on paper are cold and they have got to be right. I don't mean to imply that either Mr. Ely or I used any language here today that is not strictly in accordance with the decisions we have cited. I am sure we both tried to be as fair in our approach to it as as we can be. I suggest to your Honor after you have read the examination under oath and considered the matter that if further writing will be helpful, I will be happy to participate in it further.

The Court: I will ask Mr. Ely. Do you feel that you can cover everything in your oral argument, or do you feel——

Mr. Ely: I feel that I can, your Honor.

The Court: Mr. Ely represents quite a few insurance companies down here himself.

Mr. Hauerken: I know that, your Honor.

The Court: He is in litigation every day.

Mr. Hauerken: I was going to make a remark like that, but I thought I had better not.

The Court: Well, he represents both sides. He represents both plaintiffs and defendants. He said just now he would like to have the matter submitted on oral argument. I realize he is in trial every day and he can't turn this over to somebody else in his office because they wouldn't know about it. So we will conclude the matter after oral argument.

Mr. Ely: Here is the way I would feel about it, [181] your Honor. This gentlemen has been kind enough to write down these oral arguments and I

would be delighted, if the Court feels it would be of help, at my own expense, not only to have my own discussion typed up for the Court to review, but also to have Mr. Hauerken's discussion.

Mr. Hauerken: We would join in anything of that nature.

Mr. Ely: If the Court feels it is necessary, all the Court has to do is order it.

The Court: At the present time, I don't think I need it, but if I do I will order it and instruct him to bill both of you equally. But I don't think I will.

Mr. Ely: I am going to get through here in about ten minutes, so I hope nobody is going to be fidgety.

The Court: We are holding up all right. We will take a minute or two recess.

(A recess.)

The Court: All right, Mr. Ely.

PLAINTIFF'S REPLY

Mr. Ely: I have reread the Sierra Milling case. That is the case in 76 California Reports at page 235. I am going to read the exact language from that case.

"The fact that he was 65 feet from the mill in front of a blacksmith shop in full view of the insured property * * *" That is just one part.

I am certain that Mr. Hauerken did not mean to [182] mislead the Court. He was careful to point

out that he had not hitherto been made aware of this case and that he read it during the progress of the trial or perhaps some recess. There is no question whatsoever that the watchman in this case was not on the insured premises. I have read the case twice. He was 65 feet away from the insured premises, and the insurance policy in that case required that a watchman be in or on the insured premises at all times during the night. The court held that he was 65 feet away. I don't gainsay the proposition that the blacksmith shop may have been on property which was contiguous to the insured premises, and in that sense may have been part of the premises. But the opinion makes it quite clear that the watchman was not on the premises and was 65 feet away. And yet it was held that it was a substantial compliance. That is a California court speaking.

Counsel said he hadn't had an opportunity to read the other case cited. I did. The other case, in which the judgment was for the company, was in a case where the man, who was supposed to be in or upon the premises, was two thousand feet away, which would be almost half a mile. But in this case it is 65 feet away. They said he had a better view perhaps of the insured property than he would have had on it. So much for that.

Counsel changed his approach entirely from that which was adopted in his trial memorandum filed a few days ago. [183] In that memorandum written by counsel, by counsel's office, this section Clause 5 (I), which has given us some concern, this auto-

mobile exclusion, was referred to repeatedly as an exclusion, all the way through. For example, on page 5, "The first applicable exclusion forms the basis of the third defense of our answer." Then he goes ahead and he cites other cases, this Ruvelson case, the Kinscherf Company case, and here is some language at the beginning of the discussion of each of these cases—this is counsel's language: "In connection with the Ruvelson case, it also contained an exclusion clause which, except for one immaterial difference in spelling, was word for word the same as this clause." In other words, counsel referred to exclusion clauses and exceptions, all through the memorandum, but when we got in here to court and we found that if this Clause 5 (I) were treated as an exception or as an exclusion, which he himself called it in his memorandum, then the burden of proof is on him and he knows that he cannot sustain it, as a matter of fact, and so he reverses his tack and now says that even though this Clause 5 (I) is listed down after 5—there is a number 5 and then it says, "This policy insures against * * * arising from any cause whatsoever except:" and then goes ahead with (A), (B), (C), (D), (E), (F), (G), (H) and (I). Even though the word "except" is used in his own policy, he now takes the position that that section (I) is not an exception, and he has to. [184] That is why he has changed the approach.

In the Greenberg case—counsel's memorandum on page 7—he says, "In the Greenberg vs. Rhode Island, we have an action on a similar policy, ex-

cepting liability for loss or damage by theft. In Dreiblatt vs. Taylor, an action on a policy with an exception clause similar to that in the Kinscherf case." I never did hear, until this date, that counsel was not going to continue to treat subsection (I) as an exception clause.

I think all your Honor will have to do is to look at the policy, insuring against risk arising from any cause whatsoever, except: and then it listed (A), (B), (C), (D), (E), (F), (G), (H) and (I), the exception in question, and if it is an exception—and I submit to the Court it couldn't be anything else both in the way it is placed in the body of the policy and just from the standpoint of good common horse sense—the burden is upon this company to prove, by a preponderance of the evidence, loss occurred while we were away from the automobile.

Then counsel goes off into a rather frantic discussion of the facts. As I said in my opening statement, I do not propose to discuss facts with your Honor, because your Honor can interpret facts as well or better than any of us. But counsel knows that if this Court finds, as I submit to the Court is the proper, finding, under this factual situation, that [185] these people have not proved that this property was stolen while we were away from the car, then they have lost. All of their technicalities stand for not in the face of a factual finding in this instance, as I think the Court should feel obliged under common sense to do, that this property must have been taken somewhere during that trip from—well, the last trip, the four mile trip.

And I know I can be wrong. Sure, I am an advocate here, certainly, and if I am wrong I will say this to you, your Honor, in the presence of my client. This lawsuit is not worth winning if we are not right. But I don't see how this property could have been lost anywhere else, especially in view of the fact that these two businessmen have come here to testify in substance that it could not have been taken at their place. That is what the substance of their testimony boils down to.

Now, they are impeached in minor details by a paged statement not written by them, writ n by somebody else, and counsel impeached him—I don't mean to criticize counsel, but counsel attacks the credibility of these two gentlemen by what is not in the statement. I have forgotten what it was, but he said that you don't see anything in this statement about this and so that these gentlemen testified about. Well, does your Honor for one moment or is anybody so naive as to believe that these little short printed statements contain everything that was said by these gentlemen when they were [186] talking to these adjusters? I suppose adjusters are human, too, and they want to get through. These statements are written on a page or a little more than a page of these two gentlemen and the Court is asked to discredit them on the basis of what came up in the statement, which was taken by someone presumably in the interest of the defendant here.

I submit to your Honor that the testimony of those two gentlemen excluded the hypothesis that

this jewelry could have been taken either behind the store or where the new car was being examined that the man had bought for his wife, or during that brief interval of time that my client was examining the diamond, because Mr. Nigro testified that positively during that interval he was standing with his eye on the car. It was not stolen then.

Mr. Stelzer says that during the time they were in the place behind his store in a little area the size of this part of the courtroom, he knows that no one came there, that they were the only two there, he heard nothing, it was quiet—that there was nothing. That is true.

Then this company cannot sustain the burden of proof that that jewelry was taken at one of those two times, and they have to do it in order to win this case.

Now I ask you, suppose a man's liberty—disregarding the burden of proof, the quantum of proof, the reasonable doubt—I ask you, your Honor, if a man's liberty rested on [187] the finding that he must be found, under this type of circumstantial evidence, to have lost or to have had this property stolen during the period of time when he was looking at the new Ford, that little bit of time, or the little bit of time when he was looking at the diamond, when you have the testimony of the two disinterested witnesses who were watching and who, in effect, said it was not stolen at that time, would your Honor or would any court find adversely to that man so he would lose his liberty?

On an issue on which this company has the burden of proof, they ask your Honor circumstantially, on the basis of circumstantial evidence and conjecture and speculation, to pick out a time when this property was stolen and to say it was stolen when my client was away from the automobile so as to defeat the coverage and say you shall stand the loss. That is why I say that when you consider the burden of proof, which rests upon the defendants, I submit to the Court that the Court ought to find that this property was stolen at a time when this man was upon the automobile during that trip or sometime when he was upon the automobile, and therefore all this other becomes immaterial, actually.

I am not going to feel myself bound by any Minnesota court, which didn't even discuss the problems that I have raised here. This court is entitled to follow, to apply the law of this jurisdiction and it is obliged to follow the law of this jurisdiction, and the only case that is anywhere near [188] in point is the case which counsel says that he hadn't seen until he came here today. In none of the cases that I have found or that I have examined, cited by counsel, was this problem raised that I think is an absolutely meritorious problem, the one I discussed at length this morning.

Counsel spent five or ten minutes arguing that my client was contributively negligent—at least, that was the import of his argument. I find nothing in this insurance policy that says that a man shall be barred because of contributory negligence. I

never heard of such a thing. He says he left his key—and you are to decide this case on the equities —and he shouldn't have done it. I daresay that every house that burns down almost, there is some negligence involved, and yet when we try to collect for the insurance we paid our premiums for, are we to be met in court by insurance lawyers— I don't say it disparagingly—are we to be met by the contention, "Well, you let matches out," or "You let mice run around where matches were; therefore, we are not going to pay it"? But that is the sort of thing this company hopes to defeat my client on.

One final thing. I cannot debate the proposition that he is correct that we are limited in recovery. We are entitled to recover $15,000 in this case for our jewelry, plus $914.50, which is the testimony as to the value of the cases, and I concede, at least as far as I am concerned—the Court, [189] with its legal research, may find more extended coverage —but I for one am forced, in good conscience, to concede that from my study of the situation counsel is at least right in his sixth defense, and that my client is limited accordingly.

The Court: All right, I will take the matter under submission.

Mr. Hauerken: May I say this, your Honor. I don't want to discuss any factual matters, just this one case again,

The Court: All right.

Mr. Hauerken: I would appreciate it. I am sure your Honor will read it, but I invite your attention

to the language on page 237: not only that he was upon the premises, but also "We do not see any element in the act of the corporation that the watchman showed any violation of the warranty." So the case was decided, predicated upon the fact that the warranty was not violated.

The Court: All right. Thank you.

Mr. Hauerken: Thank you.

[Endorsed]: Filed October 19, 1956. [190]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 85, inclusive, containing the original

Petition for Removal.

Notice of Filing Petition and Bond for Removal.

Answer of Defendant.

Defendant's Trial Memorandum.

Plaintiff's Trial Memorandum.

Defendant's Statement of Objections to Findings and Reasons Therefor.

Findings of Fact and Conclusions of Law.

Judgment.

Stay of Execution.

Motion for a New Trial and Motion to Make New Findings and Conclusions and Direct the Entry of a New Judgment.

Memorandum of Points and Authorities in Support of Motion for a New Trial and Motion to Make New Findings.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Order Extending Time to File Record on Appeal.

and a full, true and correct copy of the Minutes of the Court on March 26, 27, 1956; April 4, 1956; July 16, 18, 1956.

B. All exhibits; (plaintiff's 1 and 2 defendant's A-D, inclusive).

C. 2 volumes of Reporter's Official Transcript of proceedings had on March 26, 1956; March 27, 1956.

I further certify that my fee for preparing the foregoing record, amounting to $2.00, has been paid by appellant.

Witness my hand and the seal of said District Court, this 22nd day of October, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15337. United States Court of Appeals for the Ninth Circuit. Centennial Insurance Company, a Corporation, Appellant, vs. Dave Schneider, Doing Business as Dave Schneider Wholesale Jewelry, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California. Central Division.

Filed October 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15337

CENTENNIAL INSURANCE COMPANY, a Corporation,

Appellant,

vs.

DAVE SCHNEIDER, Doing Business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Appellee.

STIPULATION REGARDING EXHIBITS

It Is Hereby Stipulated that none of the exhibits transmitted to the Court of Appeal need be printed in the transcript and that all of said exhibits may be considered by the court in their original form and shall be deemed to be material parts of the record on appeal as if they were printed m or otherwise reproduced as part of the printed transcript.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, ST. CLAIR & VIADRO,
Attorneys for Appellant.

/s/ WALTER ELY, for
Samuelson & Buck,

/s/ WALTER ELY, for
Betts, Ely & Loomis,
Attorneys for Appellee.

[Endorsed]: Filed November 9, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF THE POINTS UPON WHICH APPELLANT INTENDS TO RELY

(1) The trial court erred in finding that, under the policy issued by appellant to appellee, appellant agreed to pay appellee for "any loss of or damage to jewelry and other property of the plaintiff" (Finding III) and in concluding that the loss, if any, sustained by appellee was covered by the policy.

(2) Assuming, but no conceding, that appellee's jewelry and sample cases and trays were stolen from the trunk of his automobile, the trial court erred in finding and concluding that appellee was in his automobile at the time when his jewelry, cases and trays were thus stolen (Findings VII and XI, Conclusion II).

(3) The trial court erred in finding and concluding that appellee's loss was not an unexplained loss or mysterious disappearance within the meaning of the policy issued by appellant to appellee (Finding XIII, Conclusion III).

(4) The trial court erred in finding and concluding that appellee did maintain an inventory of his property as required by the policy (Finding XV, Conclusion IV).

/s/ GEORGE H. HAUERKEN,

HAUERKEN, ST. CLAIR & VIADRO,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 9, 1956.

DEC 10 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 671

DAVE SCHNEIDER, doing business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Petitioner,

vs.

CENTENNIAL INSURANCE COMPANY, a corporation.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

DAVE SCHNEIDER, doing business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Petitioner,

vs.

CENTENNIAL INSURANCE COMPANY, a corporation.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Dave Schneider, doing business as Dave Schneider Wholesale Jewelry, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on August 20, 1957.

Opinion Below.

The opinion sought to be reviewed[1] is reported at 247 F. 2d 491.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 20, 1957. Petitioner's Motion for Rehearing, as well as for a Rehearing *en banc* in that Court, was denied on September 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

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[1]Included herein as Appendix "A".

Questions Presented.

I.

Was the court below entitled to select from the record and incorporate in its opinion merely those facts which tended to support its ultimate conclusion, incorrectly state facts, omit the consideration of material facts, and refuse to cure such incorrections and omissions when such were called to the Court's attention in a Motion for Rehearing duly filed?

II.

Was the court below authorized to ignore a fundamental and controlling principle of local law in the consideration of a problem, the resolving of which concededly called for the application of local principle?

III.

Was the court below justified in ignoring the principal issue presented by the litigants in the briefs in order to substitute its own judgment for that of the trial judge who decided the disputed factual issues?

IV.

Does Rule 52a, Federal Rules of Civil Procedure, have any force and meaning in the courts of the United States, or may it be warped and tortured so as to be accommodated to the wishes of an Appellate Court which desires to substitute its factual judgment for that of a trial court?

Importance of the Question and Why the Supreme Court of the United States Should Grant This Petition.

The opinion of the court below, in effect, changes the law of California insofar as it is to be applied in the Federal Courts. The opinion and the judgment therein is catastrophic to the hundreds, and probably thousands, of insurance policy holders such as Petitioner, who have paid, and will pay, enormously great premiums for the type of protection which Petitioner thought he had, and which he did have, under the law of California until the decision reached by the Honorable Court of Appeals for the Ninth Circuit. The opinion clears the way for the continued writing of insurance policies which on their face appear to afford protection to the policy holder, but under the decision of the court below amount, in effect, to mere scraps of paper. The insurance paying public of the State of California should not be laid open to victimization, and the opinion under attack constitutes a clear invitation to insurers to vitiate the true object and purpose of insurance protection by the employment of clever and ingenious draftsmanship. While the amount involved in this appeal is less than $20,000.00, there may be literally hundreds of thousands of dollars at stake in the ultimate disposition. The issue is grave from a social and economic standpoint and warrants the study and careful deliberation of the highest judicial authority in the land.

Statement of the Case.

Dave Schneider, your Petitioner, is an honorable wholesale jewelry merchant who has conducted his business in the City of Long Beach, California, for a period of many years. The goodness of his reputation has been admitted throughout these proceedings.

On December 3, 1954, Schneider put his jewelry samples, the value of which, including cases, was something over $26,000.00, into the trunk of his automobile and embarked on a visit to some of his retail customers. He called upon two of these customers, removed the jewelry from his automobile, and displayed the same to the retailers in their stores [R. 57-58]. After visiting the second customer, Schneider replaced the jewelry into the trunk of his car at approximately 2:00 p.m. and locked the trunk [R. 58-59]. He drove to the establishment of a third customer, a man by the name of Steltzer, but did not display the jewelry to that customer [R. 63]. He visited with Mr. Steltzer for a few minutes, and then drove to the store of a fourth customer, California Premium Service, located approximately four miles away [R. 70-71]. Traffic was very heavy on the thoroughfare which he traversed, and a period of approximately forty-five minutes was required to drive the distance [R. 70-71]. Schneider reached the latter establishment at 4:30 p.m., and there discovered that his two sample cases and his jewelry were missing from the trunk of his car [R. 70-71].

Plaintiff's testimony was to the effect that only twice was he outside his car without his jewelry, and on these two occasions, when he was away for less than one minute, his car was being watched at all times [R. 81, 83-85, 123].

Throughout these proceedings it has been conceded that the jewelry was stolen on the trip in question. Schneider does not know when the jewelry was taken; neither does the insurance company. The police were notified immediately after the discovery of the theft, and neither litigant was able to make proof as to when and in exactly what manner the jewelry thieves operated.

On August 5, 1954, Schneider had purchased from his adversary in this litigation, a so-called jewelry block floater insurance policy.[2] The annual premium was $597.21. The policy is called an "all-risk" policy, and is doubtless represented to be such by insurance brokers who market the contract to the premium paying public in California. If the opinion and judgment of the court below is finalized, the description becomes almost laughable. The policy is set forth *in haec verba* in Appendix B of Schneider's Petition for Rehearing in the court below.

The insuring provision, Paragraph 5 of the policy reads:

> "This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:"

and then follows, in fine print, thirteen exceptions, eight sub-exceptions, and fifteen conditions.

---

[2]Printed in its entirety herein as Appendix "B".

Although the respondent pleaded many exceptions in defense of its obligation, including a valid one whereby Petitioner's recovery was limited to $15,914.50, the controversy has centered around exception (I) of Paragraph 5, hereinafter referred to as exception 5(I). This exception purported to, and according to the court below, did exclude coverage for theft if the theft occurred while Schneider was away from his automobile.

The court below neglected to point out that when theft was sought to be excluded, the word "theft" was used in the insurance contract. It was used in exception 5(A), and in exception 5(K), the words "theft or attempted theft" are used. *The words "theft" or "attempted theft" were not used in exception 5(I).* The court below read the words into the exception which reads as follows:

> (I) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail.

The opinion under attack did not point out that the express language pertaining to theft or attempted theft was used in exceptions other than that quoted immediately above, and into which the court below wrote the language in order to turn Petitioner away empty handed.

REASONS FOR GRANTING THE WRIT.

I.

This Is a Case of First Impression and One of Far-Reaching Importance.

There is no other recorded opinion in which the problems are the same as presented here. Through the years insureds under automobile and fire insurance contracts have come to be protected because of extensive litigation in such matters, and wide-spread and uniform interpretation by the Courts. There is no such uniformity and standardization in the kind of contract now under consideration. The language utilized by the insurers in these so-called "all-risk policies" varies with the draftsmen for the particular carrier who may seek to afford the least protection to the insured by the inclusion of the most exceptions and the most ambiguity.

The established rule under California law as to the interpretation of insurance contracts is as follows:

> "If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage whether as of peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured."

Continental Casualty Co. v. Phoenix Const. Co. (1956), 46 Cal. 2d 423, 437-438;

Ensign v. Pacific Mutual Life Insurance Co. (Feb., 1957), 47 A. C. A. 887, 891.

This rule is fair. It is equitable. But the court below did not apply it. If applied in the case at bar, Petitioner would have recovered that for which he had paid.

The opinion in the court below neglected to include mention of Section 1641 of the California Civil Code, providing:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, *each clause helping to interpret the other.*" (Italics ours.)

The application of this statute to this case should have meant that the consideration of the clauses in exceptions 5(A) and 5(K) wherein the words "theft" and "attempted theft" were used, would have led to the conclusion that exception 5(I), referring only to "loss or damage to property," was not intended to apply to theft. The court below, for a reason which we cannot understand, read into the words "loss or damage to property" the meaning, theft *of* property.

Why, in Heaven's name, should such a strange interpretation have been made in favor of the insuring party, the one who had the sole control over the language employed in its contract, one who was presumably able to engage the services of the most competent draftsmen, and one who, if it meant to include theft as an exception in Paragraph 5(I), could have used the words as easily as was done in the case of exceptions 5(A) and 5(K).

The court below characterizes the language of exception 5(I) as being clear and unambiguous and cites *Greenberg v. Rhode Island Ins. Co.* (1946), 66 N. Y. S. 2d 457, 459,

and *Princess Ring Co., Inc. v. Home Ins. Co.* (1932), 52 R. I. 481, 161 Atl. 292, 293. These decisions have nothing to do with California law which specifically states:

> "If semantically possible, the insured and not the insurer is to have the benefit of the doubt." (California cases cited, *supra.*)

It does not appear that in either of the cases cited, the point made was even raised, and it does not appear that in either of the two cases leaned upon by the court below, other parts of the insurance contract contained explicit wording as to theft, such as did the non-standard so-called "all-risk policy" involved in the case at bar.

Petitioner in this case was entitled to the application of California law—not Rhode Island law or New York law and he was entitled to have his insurance contract interpreted in the light of its own provisions and California statutes, and not according to fancied analogy between his contract and the detailed provisions of those not revealed in the cited authorities.

The opinion sought to be reviewed characterized the arguments of Petitioner's lawyers, as "clever." The characterization would, perhaps, be apt if the only facts were those which were set forth in the opinion, but although the omission was called to the Court's attention in a Motion for Rehearing, the Court has refused to make it known that exceptions 5(A) and 5(K) contain the explicit words "theft" or "attempted theft," and that exception 5(I) did not. We disclaim cleverness in our presentation. We submit that under any fair rule of inter-

pretation, especially the liberal and safeguarding rule of California, the intendments should have been resolved against the insurer, and that, hence, theft was not an excluded contingency under exception 5(1).

If the judgment of the Court of Appeals for the Ninth Circuit is permitted to stand, the premium paying public of California will receive no real and substantial protection for the premiums it pays.

II.

The Decision of the Court Below Is Clearly Wrong, and Rule 52a, Federal Rules of Civil Procedure, Was Mocked.

Assuming that exception 5(1) applied to theft, the trial court found, as a fact, that the admitted theft did not occur at a time when Schneider was away from his automobile. It was submitted to the trial court, and to the Appellate Court, that no other finding was possible under the law. It has been heretofore pointed out that Schneider could not prove when and where the theft occurred, and neither could the respondent.

Under California law, it is axiomatic that the burden of proof rests upon the insurer to establish that a loss occurred under such circumstances as to bring such loss within an exception or an exclusion of coverage. *Bebbington v. California Western States Life Ins. Co.*, 30 Cal. 2d 157, 180 P. 2d 183; *Rossini v. St. Paul Fire & Marine Insurance Co.*, 182 Cal. 415. In its reply brief in the court below respondent's first sentence reads "We have no quarrel with any of the well settled rules upon which plaintiff relies in his brief."

In this case where the existence or non-existence of coverage may be dependent upon the question of whether property was stolen at one time or another, and when neither litigant is able to prove the time contended for, the court below overturns the trial court's finding of fact and decides the issue *without a mention or a word* of a principle which we submit is controlling under California law, and that is, upon whom rested the burden of proof. To us, this omission of reference to a point to which a main portion of the briefs and arguments in the court below was directed, is completely inexplicable.

The opinion under attack reads like the concluding chapter of a story by A. Conan Doyle. While it is a careful opinion in its analysis of the facts, detective-like in its approach, its effect is to characterize the trial judge as a fool. The trial judge applied California law. He held that the insurer could not prove that the property was stolen while Petitioner was away from his automobile, and that since the insurer had the burden of proof, the finding had to be against the insurer. The intermediate court wrought an injustice to the trial judge. It did not cast him in a proper light. It made him appear idiotic. Reference was made to Rule 52a, the Court determining that such Rule gave it authority to overturn the trial court's finding of fact if it concluded that a mistake had been made. We have no quarrel with the right of the Court to interpret Rule 52a in this manner. We do most sincerely feel, however, and so submit, that the "mistake" which is contemplated under such interpretation of

Rule 52a, should be a "mistake" made in the application of legal principles to factual disputes.

Is it fair that the highest court in the land should permit its inferior court, in a decision of this nature, to disregard completely the arguments made by the litigants in their briefs on a controlling principle of local law, to-wit, the issue of burden of proof as to a fact about which there is mystery to both parties?

Conclusion.

No great Constitutional issue is here involved. Petitioner is not one who has sought the protection of the Fifth Amendment. There is no suggestion that he is a Communist. There is no important social problem of race relations involved. Schneider is just an ordinary American citizen with an ordinary lawsuit. Just as much as any alleged Communist or offended member of a minority group, he believes that he is entitled to a consideration of legal principles by the Supreme Court of the United States. He can, and will, if he must, survive the loss of $15,914.50. The integrity of the law is that which should be protected, even above and beyond innocent victims who may, in the future, be deluded into purchasing hybrid forms of insurance contracts such as that which is here involved. Courts should meet legal issues head-on. Opinions on appeal should recite all of the facts, not those only which tend to support the conclusion to be reached. If they do not do this, they should be reviewed. However unimportant the case may be from a relative standpoint, no honorable man, and no honorable lawyer, can justly feel

offense at the loss of his cause provided it is made apparent that all of his contentions have received consideration. In this case, an injustice has been done. It is respectfully submitted that this is a case wherein the deficiency of the opinion itself, its injustice to the trial judge, and its avoidance of discussions of the issues in the briefs, lends great weight to Petitioner's prayer for a hearing in his Supreme Court.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FORREST A. BETTS,

JOHN A. LOOMIS,

Attorneys for Petitioner Dave Schneider, Doing Business as Dave Schneider, Wholesale Jewelry.

Of Counsel:

BETTS, ELY & LOOMIS,

SAMUELSON & BUCK.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

Centennial Insurance Company, a Corporation, Appellant, vs. Dave Schneider, Doing Business as Dave Schneider Wholesale Jewelry, Appellee. No. 15,337, Aug. 20, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, Chief Judge BONE and CHAMBERS, Circuit Judges.

BONE, Circuit Judge.

Centennial Insurance Co. (hereinafter "Centennial"), defendant below, appeals from a judgment entered by the District Court. The action was brought by Dave Schneider, doing business as Dave Schneider Wholesale Jewelry, to recover on a policy of insurance issued by Centennial to appellee on August 15, 1954, and continuing in force for a period of one year. The claimed loss of jewelry and their carrying cases allegedly covered by the policy occurred on December 3, 1954.

On the morning of December 3, 1954, at about 10.00 A.M. appellee left his place of business. As a wholesale jeweler appellee traveled by car from retailer to retailer, carrying the jewelry to be displayed in two specially fitted cases which he carried in the trunk of his car. Following his lunch, he drove to Bruce Jewelers in Inglewood, California, removed the cases from the trunk of his car, took them into the jewelry store, displayed his line of jewelry, returned the cases to the trunk, and drove to Joy Jewelry Company, also in Inglewood.

Appellee did not remove his cases at Joy Jewelry Co. He did not enter the premises, but talked with one of the buyers at Joy, Mr. Stelzer, in front of the store so he could see his car. Appellee and Stelzer got into appellee's car, drove around the block and into a blind alley and parked appellee's car behind a new car (a Ford and hereinafter called "Ford") purchased by Stelzer for his wife. Both appellee and buyer apparently got into the Ford car, the buyer then showing appellee the dashboard equipment. Appellee testified he had locked his car, and adjusted the rear view mirror of the Ford so that he could see his car. The inspection of the Ford lasted from five to fifteen minutes. Appellee then returned to his car and drove about four miles to the store of another customer, California Premium Service.

The drive to California Premium Service took some forty-five minutes because of heavy traffic at that hour. Appellee parked his car close to California Premium Service and claims that he watched it at all times while talking to Mr. Nigro of California Premium Service, except for about one minute when he examined a diamond, and during this time Mr. Nigro watched appellee's car. It was after inspecting the diamond that appellee opened the car trunk to remove his cases, and found both cases were not there. Centennial was notified and the police called.

Appellee's car was a 1954 Cadillac Coup de Ville model. The trunk latch locked automatically when the trunk door or lid was closed. The trunk latch showed no evidence of tampering. The trunk lid was of the type which rises if not latched shut because of a spring mechanism. Testimony was conflicting as to how high the trunk lid would have to rise or would have to be raised up for appellee to notice it by looking into the rear view mirror. At trial

appellee testified it would have to be up all the way for him to see it in his rear view mirror. The jewelry cases were about 4½ feet tall, 2½ feet wide and 20 inches in depth, weighed about 25 pounds when empty, and about 65 pounds (counting the jewelry contents) on the day in question. Each case was on wheels to facilitate moving it. Counsel for Centennial elicited by questioning at trial (and strongly emphasizes in its brief in this Court) that between the time he left his place of business at 10:00 A.M. and the time he discovered the loss of the jewelry, about 4:30-5:00 P.M., appellee made no use of a rest room, the implication being that appellee probably did make use of a rest room during this seven hour period, forgot about it, and that it was during this time when the car would be out of his sight that the theft was committed.

Both parties seem to entertain the view that the loss was a result of a *theft*, and the District Judge found the jewelry to have been *stolen*. Major controversy centers on clause 5(I) of the policy, which reads:

"5. This policy insures against all risks of *loss of or damage to* the above described property arising from any cause whatsoever *except:*

* * * * * * * * *

"(I) *Loss or damage to property insured hereunder while in or upon any automobile*, motorcycle or any other vehicle *unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle.* This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail." (Emphasis supplied.)

Appellee argues that the language in the exception clause, (I), "* * * loss or damage *to* property while in or upon an automobile * * *," is ambiguous, and should be construed most strongly against Centennial. Appellee also asserts that "* * * loss or damage *to* property * * *" can mean only *damage to* property and does not include *theft* as a theft involves "loss *of*" property rather than "loss * * * *to*" property. Thus, says appellee, the exception clause does not apply in this case. This is a clever argument, and is indicative of the thoroughness with which counsel has represented appellee. However, we cannot accept the argument. We believe the language of the policy excepting "*loss or damage to* property" expresses the intention to except *theft of* property from an automobile on the terms therein stated, and not alone to except *damage* to property (assuming damage means something entirely different from theft). We are supported in this view by other decisions which have found similar language to be reasonably clear and unambiguous, and applied such language to cases of theft. *Cf.* Greenberg, v. Rhode Island Ins. Co., 1946, 66 N. Y. S. 2d 457, 459; Princess Ring Co., Inc. v. Home Ins. Co., 1932, 52 R. I. 481, 161 Atl. 292, 293.

It is appellee's further contention that direct testimonial evidence shows that the insured property was not taken from the car while appellee was out of the car since at all such times the car was watched and no one watching saw anyone open the trunk. From this appellee argues that he not only must have been, but that he was, in the car at the time of the theft. This apparently was the view of the trial judge as findings were made that the "* * * jewelry and sample cases and trays were stolen from the trunk of plaintiff's automobile at a time when the plaintiff was in such vehicle."

While testifying, appellee, over objection of Centennial's counsel, gave as his opinion to explain the occurrence of the loss, that it probably happened during the time that appellee was driving to California Premium Service after leaving Stelzer following examination of Stelzer's Ford. The traffic moved slowly, there were many stops. Appellee was of the opinion the thief (or thieves) somehow removed the cases and contents while his car was stopped, loaded them into another vehicle and made a getaway.

Centennial asserts that such a view of the "theft" must be rejected as "inherently incredible"; that the theft could not have happened while appellee was in the car without appellee being aware of its commission.

Under Rule 52(a) of the Fed. Rules Civ. Proc., a finding is clearly erroneous when, although there is evidence to support it, a reviewing court on reviewing the entire evidence is left with a definite and firm conviction that a mistake has been made. United States v. Gypsum Co., 1948, 333 U. S. 364, 395-396; Smyth, Collector of Internal Revenue v. Erickson, 1955, 9 Cir., 221 F. 2d 1, 4; Alaska Freight Lines v. Harry, 1955, 9 Cir., 220 F. 2d 272, 275. *Cf.* United States of America v. One 1950 Buick Sedan, 1956, 3 Cir., 231 F. 2d 219, 223, on drawing reasonable inferences from "basic facts."

After a complete study of the evidence we are left with the conviction that a mistake has been made. We reach this conclusion for two reasons. In the first instance, the testimonial evidence is not convincing that appellee or others with whom he did business that day could adequately *see* the trunk of the car at all times. Of particular interest is the testimony concerning the several minutes that appellee was inside the Ford examining it with Stelzer

of Joy Jewelry Co. If we take the testimony most favorable to appellee (as we are required to do) United States of America v. Comstock Extension Mining Co., Inc., et al., 1954, 9 Cir., 214 F. 2d 400, 403, we find these facts: the Stelzer Ford was parked in a blind alley; the front of appellee's Cadillac was parked closely behind the rear of the Ford; the rear end of the Cadillac was about parallel with the sidewalk running along a street which ran at right angles to the alley; appellee was in the front seat of the new Ford car attempting to watch the trunk of his car by looking into the rear view mirror while he also looked at the instrument panel of the Ford and talked with Stelzer; appellee testified that he couldn't see the back of his car "* * * very well, because the back was quite a ways back * * *;" appellee looked into the rear view mirror "* * * off and on * * *" as Stelzer showed him the panel in the Ford; appellee spent (by the most favorable testimony) five to seven minutes in the Ford.

We believe this testimony substantially derogates from appellee's insistence that he could see his car at all times. These facts are specially significant when considered with that part of appellee's theory which postulates that the thief (or thieves) in some way had procured a key which fitted the lock and could open the trunk with ease and dispatch. With a key to expedite opening, and with appellee having a poor view of the trunk, the trunk could have been opened, raised to a height sufficient to remove the cases, the theft completed and the getaway made without appellee being conscious of the crime. We believe that Centennial has shown by appellee's testimony that he did not always have a clear view of his car when not in it, so that the theft could have been committed while appellee

was not in the car and without appellee knowing of or seeing its commission.

We also believe that it is most doubtful that the two cases, with their contents could have been removed from the trunk while appellee was in the car without appellee being aware at the time that a theft was taking place, though he might not have been able to prevent its completion. We must remember that each case measured 4½ feet tall, 2½ feet wide and 20 inches deep, and weighed (with contents) sixty-five pounds each. Each case was in the trunk of an automobile so that the trunk lid would have to be raised to remove it. Evidence is not clear as to how high the trunk lid would have to be raised, but it would have to be raised at least 20 inches, as this is the minimum measurement of the cases. Probably the trunk would be opened wider so the thief (or thieves) could more easily take hold of the cases and remove them without dragging them across the car frame and edge of the trunk, which would shake the vehicle, make considerable noise, and alert the driver. And when a sixty-five pound weight is removed from the rear of a car, the car probably would move or sway sufficiently to arouse the driver to the fact that something is happening to his car; he will look about. And further, the thief (or thieves) must have shut the trunk with sufficient force to lock it shut as appellee testified that if not latched properly the trunk lid would rise, especially if he drove. Appellee testified that it did not rise while he drove that day, and that it was locked when he went to remove the cases at California Premium Service. Yet, through all of these possible steps which the thief (or thieves) would have taken to complete the theft, appellee was unaware of any noise, in, or unusual or surprising motions of the car.

But even if the appellee might not notice such events, drivers moving behind appellee would certainly have seen the thief (or thieves) and probably those drivers, when seeing a person (or persons) surreptitiously approach appellee's car and without any sign of approval by appellee remove two large cases and place them in another car or take them to the sidewalk, would sound their horns or call. But even if there was complete silence from all the other users of the road at that time, and even if the trunk could not be seen in the rear view mirror unless raised to its maximum height, the thief (or thieves) would have had to carry or wheel the cases to the sidewalk or to another vehicle, which would have given appellee an excellent opportunity to see at least part of the commission of the crime. A person (or persons) walking about in a busy street, even if traffic is temporarily halted, carrying or wheeling large cases would attract attention.

But the basic theory of appellee is that the theft was committed by removing the cases from his car and placing them in a getaway car while appellee was held up by slow moving traffic. This directly conflicts with appellee's theory that the crime was accomplished this way so that a fast escape could be made. If traffic was "bumper to bumper," (as appellee testified) so that appellee could not move speedily, it seems clear that a speedy getaway of the thieves would be impossible.

Centennial has shown by the testimony of appellee himself that he could not see his car clearly at all times when he was out of it. This overcomes appellee's assertion that the theft was committed while appellee was in the car as he could observe the car at all times and no one removed anything from the trunk while he watched it. And we believe that appellee's own theory of the theft is incredible.

After reviewing the entire record we entertain the firm and definite conviction that a mistake was made by the trial court. On the basis of all the evidence in this case, we believe that in finding that the jewelry was stolen from the car trunk at a time when appellee was in such vehicle, the lower court bridged an impassable chasm with an assumption.

The cause is remanded to the District Court with instructions to vacate the judgment and to enter judgment that appellee take nothing.

(Endorsed:) Opinion. Filed Aug. 20, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "B."

JEWELERS' BLOCK FLOATER

Attached to and forming part of Policy Number 2WF 4871 issued to Dave Schneider dba Dave Schneider Wholesale Jewelry. Amount $40,000.00. Premium $597.21.

1. IN CONSIDERATION OF the premium above specified, and of the Proposal(s) and Declaration (s) dated the 15th day of August, 1954, attached hereto and made a part hereof and which is (are) hereby agreed to be the basis of this policy, and which the Assured hereby warrants to be true as to each and every statement and particular contained therein,

THIS COMPANY DOES INSURE:

Dave Schneider dba Dave Schneider Wholesale Jewelry, herein called the Assured, whose address is 205 East Broadway, Long Beach, California and whose premises are located at same from the 15th day of August 1954 to the 15th day of August 1955 both days at noon, standard time at place of issuance.

LIMITATIONS OF LIABILITY

2. The maximum liability of the Company resulting from any one loss, disaster or casualty is limited to

(A) $40,000.00 in respect of property at the Assured's premises as described herein;

(B) $20,000.00 in respect of property which is (1) in transit by first class registered mail, or railway express (subject to the stipulations of Exclusion (E) of Section 5), or by armored car service; (2) deposited in the safe or vault of a bank or safe deposit company; (3)

in the custody of a dealer in property of the kind insured hereunder not employed by or associated with the Assured, but property deposited for safe keeping with such a dealer by the Assured or its authorized representatives while traveling is subject to the limit expressed in Clause E of this Section;

(C) $2,000.00 in respect of shipments by first class registered air mail or air express (subject to the stipulations of Exclusion (E) of Section 5) sent to any one addressee at any one address during any one day;

(D) $500.00 in respect of shipments in transit by customer parcel delivery service and the parcel transportation service of railroads, waterborne or air carriers and passenger bus lines (subject to the stipulations of Exclusion (E) of Section 5);

(E) $15,000.00 in respect of property elsewhere and not included in Clauses (A), (B), (C) and (D) above or otherwise limited herein.

PROPERTY INSURED

3. The Property Insured is as Follows:

(a) Pearls, precious and semi-precious stones, jewels, jewelry, watches and watch movements, gold, silver, platinum, other precious metals, and alloys and other stock usual to the conduct of the Assured's business, owned by the Assured.

(b) Property as above described, delivered or entrusted to the Assured by others who are not dealers in such property or otherwise engaged in the jewelry trade;

(c) Property, as above described, delivered or entrusted to the Assured by others who are dealers in such property or otherwise engaged in the jewelry trade, but

only to the extent of the Assured's own actual interest therein, because of money actually advanced thereon, or legal liability for loss of or damage thereto.

TERRITORIAL LIMITS

4. The property described above is covered anywhere in, and in transit within and between, the Continental United States of America, Alaska, Canada, the Hawiian Islands and Puerto Rico, but subject always to the limitations, conditions, exclusions and exceptions stated herein.

INSURING CONDITIONS

5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:

(A) Loss, damage or expense caused by or resulting from sabotage, theft, conversion or other act or omission of a dishonest character (1) on the part of the Assured or his or their employees, or (2) on the part of any person to whom the property hereby insured may be delivered or entrusted by whomsoever for any purpose whatsoever, unless such loss arises while the goods are deposited for safe custody by the Assured, officer of the corporation, member of the firm or salesman while traveling, or while the goods are in the custody of (a) the Post Office Department as first class registered mail, or (b) a carrier mentioned in Section 2, or (c) a person serving as a mere porter or helper not on the payroll of the Assured.

(B) Loss or damage caused by delay, loss of marker, gradual deterioration, moth, vermin, inherent vice or insufficient or defective packing, or damage sustained while the property is being actually worked upon and directly resulting therefrom.

(C) Loss or damage caused by or resulting from

(1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack. (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces;

(2) any weapon of war employing atomic fission or radioacti force, whether in time of peace of war;

(3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

(D) Loss or damage occurring at the Assured's premises as stated herein caused by or resulting from earthquake or flood (meaning rising navigable waters). However, if the peril of fire is not excluded hereunder this policy will cover fire damage occurring during or resulting from such earthquake or flood.

(E) Loss or damage occurring in course of transit to shipments by

(1) mail unless registered first class;

(2) express unless by railway express (including air division thereof) provided, however, that a package of a value of $1,000 or more sent by the Assured, its officers, agents, servants or employees, is not covered unless it is sealed with wax or lead and unless a special declaration of value is made to the carrier amounting to not less

than 10% of the actual value of the contents of the package. In no case need such declared value exceed $1,000;

(3) railroad, waterborne or air carriers unless under receipt of their passenger parcel transportation or baggage services;

(4) motor carriers or truckmen other than under receipt of:

(a) those operating exclusively as a customer parcel delivery service;

(b) armored car service;

(c) the parcel transportation or baggage services of passenger bus lines.

(F) Breakage of articles of a fragile or brittle nature, unless caused by fire, lightning, explosion, aircraft, vehicles, flood, earthquake, windstorm, strikers, rioters, persons taking part in labor disturbances or civil commotions, burglars, thieves or accident to the conveyance in which the property insured is being carried (but only when and to the same extent that such perils are otherwise covered under this policy).

(G) Loss or damage to goods sold on the installment plan from the time they leave the Assured's custody.

(H) Loss or damage while the property is being worn (except watches worn solely for the purpose of adjustment) by the Assured, officer of the corporation, member of the firm, director, agent, employee, servant or messenger of the Assured, or by any dealer or other person, firm or corporation engaged in the jewelry trade or by any of their officers, directors, agents, employees, servants or messengers or by any member of the family, relative of friend of any of the aforesaid, or while in their custody for such purpose.

(I) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail.

(J) Loss or damage to the property hereby insured while at any exhibition promoted or financially assisted by any Public Authority or by any Trade Association.

(K) Loss of or damage to property contained in show windows at the Assured's premises by theft or attempted theft accomplished by or resulting from the smashing or cutting of such windows except as may be endorsed hereon.

(L) Loss of or damage to property exhibited by the Assured in show cases or show windows elsewhere than at the premises of the Assured as referred to in this policy except as may be endorsed hereon.

(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken, nor for loss of or damage to goods when sent "C.O.D." with the privilege of inspection by the consignee before delivery.

6. To the extent of 10% of the limit of liability stated in Section 2 as applicable at such premises this Company will pay for damage (except by fire) to that part of the building occupied by the Assured directly resulting from

theft or any attempt thereof provided the Assured is the owner of such premises or is legally liable for such damage, but in no event shall this section apply to glass or to any lettering or ornamentation thereon. The Company's combined liability under this section and under Item (A) of Section 2 shall not exceed the amount of insurance shown under Item (A) of Section 2 for the premises at which such loss or damage occurs.

7. No assignment of or change of interest under this policy shall bind the Company, nor shall any change in or additions to the premises of the Assured stated in this policy be covered hereunder, unless the consent of the Company shall be endorsed hereon. No agreement, condition, or declaration of this policy shall be waived or changed, except by endorsement countersigned by a duly authorized agent of the Company. No notice to, or knowledge possessed by any agent or any other person shall be held to effect a waiver or change in any part of this policy unless endorsed hereon and signed as above provided.

8. It is a condition of this insurance that

(A) The Assured will maintain a detailed and itemized inventory of his or their property and separate listing of all travelers' stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company.

(B) The Assured will maintain during the life of this policy, insofar as is within his or their control, watchmen and protective devices as described in his or their proposal form or in endorsements attached hereto.

9. (A) The Company shall not be liable beyond the actual cash value of the property at the time of any loss or damage and the loss or damage shall be ascertained or

estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed the lowest figure put upon such property in the Assured's inventories, stock books, stock papers or lists existing at the time the loss occurred, nor the cost to repair or replace the same with material of like kind and quality. Any antiquarian or historical value attaching to the said property shall be excluded from the estimate of loss or damage.

(B) Claims in respect of loss of or damage to pledged articles shall be limited to the amount actually loaned and unpaid plus the interest thereon at legal rates accrued at date of loss.

10. In case of loss of or damage to property of others held by the Assured, for which claim is made upon the Company, the right to adjust such loss or damage with the owner or owners of the property is reserved to the Company and the receipt of such owner or owners in satisfaction thereof shall be in full satisfaction of any claim of the Assured for which such payment has been made. If legal proceedings be taken to enforce a claim against the Assured as respects any such loss or damage, the Company reserves the right at its option without expense to the Assured, to conduct and control the defense on behalf of and in the name of the Assured. No action of the Company in such regard shall increase the liability of the Company under this policy, nor increase the limits of liability specified in Section 2 hereof.

11. It is understood and agreed that any insurance granted herein shall not cover (excepting as to the legal liability of the Assured), when there is any other insurance which would attach if this policy had not been issued, whether such insurance be in the name of the Assured or of any other third party. It is, however, understood and

agreed, that if under the terms of such other insurance (in the absence of this policy) the liability would be for a less amount than would have been recoverable under this policy (in the absence of such other policy) then this policy attaches on the difference.

12. This insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

13. In the event of loss or damage, or of anything likely to result in a claim under this policy, the Assured shall give immediate notice in writing to the Company, protect the property from loss or damage, furnish a complete list of the lost or damaged property stating the market value and cost of each article and the amount claimed thereon; and the Assured shall within sixty (60) days after a loss (unless such time is extended in writing by the Company), render to the Company a proof of loss signed and sworn to by the Assured, stating the knowledge and belief of the Assured as to the following. The time and cause of the loss or damage, the interest of the Assured and of all others in the property affected, the cash value of each item thereof, and the amount of loss of or damage thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of such property and shall furnish a copy of all the descriptions and schedules in all such insurance policies if required.

14. The Assured as often as may be reasonably required shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of their households and employees to submit to examinations under oath by any persons named by the Company relative to any and all matters in connection with a claim and subscribe the same, and shall produce for examination all books of account, bills, in-

voices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made. No such examination under oath or examination of books or documents, nor any other act of the Company or any of its employees or representatives in connection with the investigation of any loss or claim herein under, shall be deemed a waiver of any defense which the Company might otherwise have with respect to any such loss or claim, but all such examinations and acts shall be deemed to have been made or done without prejudice to the Company's liability.

15. There shall be no abandonment to the Company of any property but the amount of loss or damage for which the Company may be liable shall be payable sixty (60) days after satisfactory Proof of Loss as herein provided, is received by the Company.

16. It is understood and agreed that if in case of loss the Assured shall acquire any right of action against any individual, firm or corporation for loss of or damage to the property insured hereunder, the Assured will, if requested by the Company, assign and transfer such claim to the Company or, at the Company's option, execute and deliver to the Company the customary form of loan receipt, upon receiving payment for loss or advancement of funds in respect of the loss and will subrogate the Company to or will hold in trust for the Company, all rights and demands of every kind, respecting the same, to the extent of the amount paid or advanced, and will permit suit to be brought in the Assured's name at the expense of the Company.

17. In case of any loss or damage of any kind whatsoever, it shall be lawful and necessary, for the Assured or

his, or their factors, servants or assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance or any part thereof without prejudice to this insurance or waiver of the Assured's rights hereunder.

18. No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the State within which this policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such State to be fixed herein.

19. It is agreed that the sum hereby insured shall be reduced by the amount of any loss covered by this policy, and that the maximum limits of liability applicable to the loss, shall likewise be reduced by the amount of all losses. Such reductions shall take effect as of the date of the occurrence from which the loss arises. The amount of loss, for the purpose of this clause, shall include any amount due to the Assured and any sums paid as rewards for the recovery of insured property, or otherwise. However, the full amount insured shall be reinstated automatically and a pro rata additional premium shall be payable from the date of the occurrence. Pending adjustment of any loss, payment of the premium for reinstatement of the amount thereof may be deferred until the amount of the loss has been fixed and the precise amount of the reinstatement premium is known.

20. This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject hereof or

in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

21. This policy may be canceled by the Assured by mailing to the Company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Company by mailing to the Assured at the address shown in this policy or last known address written notice stating when not less than five (5) days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Assured or by the Company shall be equivalent to mailing. If the Assured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Assured.

22. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

(Signed) Jack Grand Agent.
Jack Grand
Insurance
Heartwell Bldg.
Long Beach 2, Calif.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957.

No. 671

Petitioner,

vs.

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 671

DAVE SCHNEIDER, doing business as Dave Schneider Wholesale Jewelry,
Petitioner,

vs.

CENTENNIAL INSURANCE COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit.

There are two reasons why certiorari should be denied in this case: (1) petitioner has not shown any special or important reason that would justify consideration of the case by this court and (2) the decision below is right and justice was done.

In fact, were it not for the personalities which petitioner has injected into the case and the unsupported charges which he has made, we would not have filed this brief at all and would have been content to let the opinion of the Court of Appeals speak for itself.

But we must answer the personalities and the unsupported charges of unfair dealing and dishonesty and we would like to do so even before we answer any contention on the merits.

Centennial Insurance Company is a wholly owned subsidiary of the Atlantic Mutual Insurance Company, an insurance company which was organized in 1842 and which is proud of its record over the following 115 years. Like its parent company, respondent pays without litigation the losses which it has undertaken to pay and, like its parent company, it very much resents the charge that it victimizes its policy holders.

Without any reference to or support in the record petitioner also contends that, unlike policies of automobile or fire insurance, the policy involved in this case was a non-standard and hybrid form of policy which was drafted so as "to afford the least protection to the insured by the inclusion of the most exceptions and the most ambiguity".

In fact, however (and we regret that we ourselves must go outside the record), the policy involved in this case is a standard and uniform jewelers' block policy which is used throughout the United States not only by respondent but by the insurance industry in general.

STATEMENT OF THE CASE.

We have no quarrel with petitioner's statement of the case except in the following particulars:

(1) Petitioner fails to mention (the opinion of the Court of Appeals of course makes that point clear) that neither he nor Mr. Stelzer had a clear view of the back of petitioner's automobile while they were talking to each other and inspecting the Stelzer automobile.

(2) Petitioner states that it has been conceded that his jewelry was stolen. While this probably makes little difference, we would rather say that, as far as respondent is concerned, it has been assumed that the jewelry was stolen.

(3) Petitioner makes no mention of clause 5(M) of the policy which excluded unexplained losses and mysterious disappearances.[1] The Court of Appeals found it unnecessary to rely upon that clause in reversing the judgment but it is apparent that it would in any event have precluded any recovery on his part.

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[1]The entire clause provides as follows:

"5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:

* * *

"(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken; nor for loss of or damage to goods when sent 'C.O.D.' with the privilege of inspection by the consignee before delivery."

ARGUMENT.

As far as the merits of the case are concerned, petitioner contends first that clause 5(1) which excludes "loss or damage to property . . . while in or upon any automobile" does not apply to a theft from an automobile.

Petitioner relies upon the rule which is indeed well settled in California (as it is everywhere else) that exceptions in an insurance policy must be construed strictly against the insurer and liberally in favor of the insured and that, as between two reasonable constructions of such a policy, the one which is the most favorable to the insured must be adopted.

It is of course our position that the automobile clause contains no ambiguity and that it can and must be construed in only one way, namely, so as to exclude the type of loss which occurred in this case. Even if it were ambiguous, however, it is clear that the strained construction urged by petitioner could not be adopted.

The very California cases cited by petitioner make it clear that it is only a *reasonable* doubt which is resolved in favor of the insured. In this case, the automobile clause is *not* reasonably capable of the strained construction which he urges.

Petitioner next contends that the judgment of the District Court should have been affirmed because, under the policy, the burden was upon respondent to

prove that the loss did not occur while he was in or upon his automobile.

The point is, however, that consideration of the issue as to the burden of proof was altogether unnecessary to a determination of the case and that of course is why the Court of Appeals did not reach that issue. A review of the evidence convinced it that, regardless of who had the burden of proof, the loss could not possibly have happened under the circumstances under which petitioner assumes that it must have happened. In other words, the Court of Appeals rejected his testimony as inherently incredible and accordingly concluded (1) that he must have been away from his automobile when the loss occurred and (2) that the findings of the trial judge which purported to rely on his testimony were "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

Convinced, as it was, that a mistake had been committed by the trial judge, the Court of Appeals was required to reverse the judgment (*United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L. ed. 746).

Its decision is of course strengthened by the fact that unexplained losses and mysterious disappearances are excluded under another clause of the policy. It is also supported by *Bliss Ring Company v. Globe and Rutgers Fire Ins. Co.*, 7 Ill. App. 2d 523, 129 N.E. 2d 784, a case in which the court rejected as similarly incredible similar testimony by the insured.

Petitioner claims that the Court of Appeals selected from the record only those facts which would support its conclusion, omitted to consider other material facts and incorrectly stated the facts which it did state. As this court will note, however, petitioner does not otherwise indicate which particular facts he has in mind.

CONCLUSION.

In the leading case on the subject, *Ruvelson v. St. Paul Fire & Marine Ins. Co.*, 235 Minn. 243, 50 NW 2d 629, the court described the purpose of the automobile clause in a jewelers' block policy as follows:

> ". . . it is difficult to conceive of a more effective deterrent to a potential thief than the presence of someone *in or upon* an automobile. It is extremely unlikely that an attempt would be made to steal from an automobile under these circumstances, and that is no doubt the very thing that the insurer had in mind in requiring actual presence in or upon the automobile (50 N.W. 2d at 635)."

Considering that such a policy covers easily stolen merchandise of high value and is issued to a policy holder who is a target for thieves, it is not surprising that the insurance company should be willing to pay only for losses which occur while the insured (or his representative) is in or upon the automobile.

It is clear that, in this case, justice was done in the court below and that no reason exists why certiorari should be granted.

For the foregoing reasons the petition for the writ should be denied.

Dated, San Francisco, California,
January 10, 1958.

Respectfully submitted,
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